

**UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF
TEXAS, DALLAS DIVISION**

In Re: Highland Capital Management, L.P § Case No. **19-34054-SGJ11**

Charitable DAF Fund, L.P et al

Appellant

§

vs.

§

21-03067

Highland Capital Management, L.P

§

Appellee

§

3:23-CV-01503-B

[167] Order granting Defendant Highland Capital Management, L.P.'s Renewed motion to dismiss adversary proceeding (related document # [122](#)) Entered on 6/25/2023.

Volume 10

APPELLANT RECORD

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and CLO Holdco, Ltd.*

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

In re:	§ Chapter 11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§ Case No. 19-34054-sgj11
	§
Debtor.	§
	§
CHARITABLE DAF FUND, L.P. AND CLO	§
HOLDCO, LTD., DIRECTLY AND DERIVATIVELY	§
	§
Plaintiffs,	§ Adversary Proceeding No.
	§
vs.	§ 21-03067-sgj11
	§
HIGHLAND CAPITAL MANAGEMENT, L.P.,	§
HIGHLAND HCF ADVISOR, LTD., AND	§
HIGHLAND CLO FUNDING LTD., NOMINALLY	§
	§
Defendant.	§
	§

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**APPELLANTS' SECOND AMENDED STATEMENT OF ISSUES
AND DESIGNATION OF RECORD ON APPEAL**

Pursuant to Rules 8009(a)(1)(A)-(B) and (a)(4) of the Federal Rules of Bankruptcy Procedure, The Charitable DAF Fund, L.P. and CLO Holdco, Ltd. ("Appellants") hereby designate the following items to be included in the record and identify the following issues with respect to

their appeal of the Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] which was entered by the United States Bankruptcy Court for the Northern District of Texas on June 25, 2023.

I. STATEMENT OF ISSUES TO BE PRESENTED ON APPEAL

- Whether the Bankruptcy Court had jurisdiction to rule on Highland Capital Management L.P.'s Renewed Motion to Dismiss Complaint
- Whether the Renewed Motion to Dismiss Complaint was improperly granted

II. DESIGNATION OF ITEMS TO BE INCLUDED IN THE RECORD

Vol. 1
000001

1. Notice of Appeal for Bankruptcy Case Adversary Proceeding No. 21-03067-sgj11 [Doc. 168].

000042

2. The judgment, order, or decree appealed from: Memorandum Opinion and Order Granting Defendant Highland Capital Management, L.P.'s "Renewed Motion to Dismiss Complaint" [Adv. Proc. Doc. No. 122] [Doc. 167].

000080

3. Docket Sheet kept by the Bankruptcy Clerk.

4. Documents listed below and as described in the Docket Sheet for Bankruptcy Case Proceeding No. 21-03067-sgj.

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No.	Date Filed	Docket No.	Description/Document Text
1	9/29/21	1	(36 pgs; 3 docs) Adversary case 21-03067. ORDER REFERRING CASE NUMBER 21-CV-0842-B from U.S District Court for the Northern District of Texas, Dallas Division to U.S. Bankruptcy Court for Northern District of Texas, Dallas Division. Complaint by Charitable DAF Fund, LP, CLO Holdco, Ltd. against Highland Capital Management, LP, Highland HCF Advisor Ltd., Highland CLO Funding, Ltd. Fee Amount \$350 (Attachments: # 1 Original Complaint # 2 Docket Sheet from 3:20-cv-0842-B) Nature(s) of suit: 02 (Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy)). (Okafor, M.)
2	9/29/21	2	(1 pg) Supplemental Document (cover sheet) by CLO Holdco Ltd., Charitable DAF Fund (RE: related document(s)1 Adversary case 21-03067) [ORIGINALLY FILED IN 21-CV-0842 AS #2 ON 04/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 2 000139 000232 000239 000270 Thru Vol. 6	3	9/29/21	6	(93 pgs; 6 docs) MOTION for Leave to File First Amended Complaint filed by CLO Holdco Ltd., Charitable DAF Fund LP (Attachments: # 1 Exh 1_First Amended Complaint # 2 Exh 2_Motion for Authorization to Retain James Seery # 3 Exh 3_Order Approving Retention of James Seery # 4 Exh 4_Order Approving Settlement # 5 Proposed Order) (Bridges, Jonathan) (Entered: 04/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #6 ON 04/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	4	9/29/21	22	(7 pgs; 2 docs) MOTION for an Order to Enforce the Order of Reference filed by Highland Capital Management LP. (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/20/2021 (mjr). (Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #22 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	5	9/29/21	23	(31 pgs) Brief/Memorandum in Support filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference. (Annable, Zachery) Modified text on 5/20/2021 (mjr).(Entered: 05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #23 ON 05/19/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	6	9/29/21	24	(926 pgs; 29 docs) Appendix in Support filed by Highland Capital Management LP re: 23 Brief/Memorandum in Support. (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13 # 14 Appendix 14 # 15 Appendix 15 # 16 Appendix 16 # 17 Appendix 17 # 18 Appendix 18 # 19 Appendix 19 # 20 Appendix 20 # 21 Appendix 21# 22 Appendix 22 # 23 Appendix 23 # 24 Appendix 24 # 25 Appendix 25 # 26 Appendix 26 # 27 Appendix 27 # 28 Appendix 28) (Annable, Zachery) Modified linkage and text on 5/20/2021 (mjr). (Entered:05/19/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #24 ON 05/19/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 7 001196	7	9/29/21	26	(7 pgs; 2 docs) MOTION to Dismiss Complaint filed by Highland Capital Management LP (Attachments: # 1 Exhibit(s) A--Proposed Order) (Annable, Zachery) Modified text on 5/28/2021 (jmg).(Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #26 ON 05/27/2021 IN U.S.DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)

Vol. 7 001203 thru Vol. 8	8	9/29/21	28	(508 pgs; 14 docs) Appendix in Support filed by Highland Capital Management LP (Attachments: # 1 Appendix 1 # 2 Appendix 2 # 3 Appendix 3 # 4 Appendix 4 # 5 Appendix 5 # 6 Appendix 6 # 7 Appendix 7 # 8 Appendix 8 # 9 Appendix 9 # 10 Appendix 10 # 11 Appendix 11 # 12 Appendix 12 # 13 Appendix 13) (Annable, Zachery) (Entered: 05/27/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #28 ON 05/27/2021 IN U.S. DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
Vol. 9 001711	9	9/29/21	33	(1 pg) Amended Civil Cover Sheet by CLO Holdco Ltd, Charitable DAF Fund LP. Amendment to 2 Supplemental Document. (Sbaiti, Mazin) Modified text on 6/23/2021 (mjr). (Entered: 06/22/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #33 ON 06/22/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001712	10	9/29/21	36	(26 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 22 MOTION for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #36 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001738	11	9/29/21	37	(22 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 36 Response/Objection Response to Motion for an Order to Enforce the Order of Reference (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #37 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001760	12	9/29/21	38	(45 pgs) RESPONSE filed by CLO Holdco Ltd, Charitable DAF Fund LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #38 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001805	13	9/29/21	39	(88 pgs) Appendix in Support filed by CLO Holdco Ltd, Charitable DAF Fund LP re 38 Response/Objection to Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint (Sbaiti, Mazin) (Entered: 06/29/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #39 ON 06/29/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001893	14	9/29/21	42	(12 pgs) REPLY filed by Highland Capital Management LP re: 22 MOTION for an Order to Enforce the Order of Reference (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #42 ON 07/13/2021 IN U.S.

			DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
VOL. 9	15	9/29/21	43 (852 pgs) Appendix in Support filed by Highland Capital Management LP re: 42 Reply. (Annable, Zachery) Modified text on 7/14/2021 (mjr). (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842AS #43 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
001905 thru Vol. 13	16	9/29/21	45 (21 pgs) REPLY filed by Highland Capital Management LP re: 26 MOTION to Dismiss (Defendant Highland Capital Management, L.P.'s Motion to Dismiss Complaint) (Annable, Zachery) (Entered: 07/13/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #44 ON 07/13/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002757	17	9/29/21	57 (7 pgs; 2 docs) MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. filed by Highland CLO Funding Ltd. (Attachments: # 1 Proposed Order) Attorney Paul R Bessette added to party Highland CLO Funding Ltd (pty:dft) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #57 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002778	18	9/29/23	58 (12 pgs) Brief/Memorandum in Support filed by Highland CLO Funding Ltd. re 57 MOTION to Dismiss and Joinder in Motion to Dismiss of Highland Capital Management, L.P. (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #58 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002785	19	9/29/23	59 (80 pgs; 5 docs) Appendix in Support filed by Highland CLO Funding Ltd re 58 Brief/Memorandum in Support of Motion (Attachments: # 1 Exhibit(s) A - Jackson v Dear # 2 Exhibit(s) B - Prudential Assurance v. Newman # 3 Exhibit(s) C - Harbourvest Settlement Agreement # 4 Exhibit(s) D - Boleat Declaration) (Bessette, Paul) (Entered: 08/30/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #59 ON 08/30/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
002797	20	9/29/21	64 (1 pg) ORDER OF REFERENCE: Pursuant to 28 U.S.C. § 157 and this District's Miscellaneous Order No. 33, this case is hereby REFERRED to Judge Stacey G. C. Jernigan of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, to be adjudicated as a matter related to the consolidated Chapter 11 Bankruptcy of Highland Capital Management, L.P., Chapter 11 Case No.19-34054. (Ordered by Judge Jane J. Boyle
002877			

Vol. 14 002878 002883 thru Vol. 16				on 9/20/2021) (svc) (Entered: 09/20/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #64 ON 09/20/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)
	21	10/19/21	66	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP, 47 Motion to strike document filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 55 Motion to abate filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) Hearing to be held on 11/23/2021 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 26 and for 47 and for 55, (Annable, Zachery)
	22	11/22/21	71	(509 pgs; 2 docs) Witness and Exhibit List <i>for Hearing on November 23, 2021</i> filed by Defendant Highland Capital Management, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding). (Attachments: # 1 Exhibits 1-13) (Hayward, Melissa)
Vol. 17 003392 003394 003583 003585 003611	23	11/22/21	72	(2 pgs) Witness List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 26 Motion to dismiss adversary proceeding, 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint), 69 Motion to abate <i>Plaintiffs' Amended Motion to Stay All Proceedings</i> (related document(s) 55 Motion to abate (related document(s) 1 Complaint))). (Sbaiti, Mazin)
	24	11/22/21	73	(189 pgs; 4 docs) Exhibit List <i>for November 23, 2021 hearing</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 47 Motion to strike (related document(s): 43 Document), 55 Motion to abate (related document(s) 1 Complaint)). (Attachments: # 1 Exhibit 1_Defendant's Memorandum of Law in Support of Motion for Reconsideration # 2 Exhibit 2_Highland Memorandum in Support of Motion to Dismiss # 3 Exhibit 3_Order (I) Confirming Fifth Amended Plan of Reorganization of Highland) (Sbaiti, Mazin)
	25	12/7/21	80	(2 pgs) Order granting Highland CLO Funding, Ltd.'s motion to dismiss adversary as a party with prejudice (related document 57) Entered on 12/7/2021. (Okafor, Marcey) Modified text on 3/11/2022 (Okafor, Marcey).
	26	3/11/22	99	(26 pgs) Memorandum of Opinion and order granting motion to dismiss the adversary proceeding (RE: related document(s) 26 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Entered on 3/11/2022 (Okafor, Marcey)
	27	3/11/22	100	(26 pgs) Order granting motion to dismiss adversary proceeding with prejudice (related document #26) Entered on 3/11/2022. (Okafor, Marcey)

Vol. 18 003637	28	3/21/22	104	(29 pgs) Notice of appeal. Fee Amount \$298 filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 100 Order on motion to dismiss adversary proceeding). Appellant Designation due by 04/4/2022. (Sbaiti, Mazin)
003666	29	5/26/22	120	(177 pgs; 2 docs) Support/supplemental document <i>Motion to Supplement Appellate Record</i> filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 111 Appellant designation). (Attachments: # 1 Amended Transcript of January 14, 2021 Hearing) (Sbaiti, Mazin)
003843	30	6/9/22	121	(1 pg) DISTRICT COURT Order: Case 3:22-00695-B is hereby transferred to the docket of the Honorable Judge Jane J. Boyle for consolidation with The Charitable DAF Fund LP, et al. v. Highland Capital Management LP, Case No. 3:21-cv-3129-N. Judge Karen Gren Scholer no longer assigned to case.(RE: related document(s) 86 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 104 Notice of appeal filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 6/9/2022 (Whitaker, Sheniqua) (Entered: 06/10/2022)
003844	31	10/24/22	122	(7 pgs) Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (Annable, Zachery)
003851	32	10/14/22	123	(31 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Annable, Zachery)
Vol. 19 003882 Thru Vol 20	33	10/14/22	124	(513 pgs; 15 docs) Support/supplemental document (<i>Appendix in Support of Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 21 004395	34	10/27/22	126	(5 pgs) Notice of hearing (<i>Notice of Hearing and Briefing Schedule on Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 12/8/2022 at 09:30 AM at https://us-courts.webex.com/meet/jerniga for 122. (Annable, Zachery)

Vol. 21 004400 004410 004442 Thru Vol. 22	35	11/18/22	128	(10 pgs) Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (Sbaiti, Mazin)
	36	11/18/22	129	(32 pgs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
	37	11/18/22	130	(254 pgs; 2 docs) Response opposed to (related document(s): 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>) filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Attachments: # 1 Appendix) (Sbaiti, Mazin)
Vol. 22 004696 004717 004732 004737 004742	38	9/2/22	131	(21 pgs) DISTRICT COURT MEMORANDUM OPINION AND ORDER: The Court REVERSES and REMANDS the bankruptcy court's Motion to Dismiss Order and AFFIRMS the bankruptcy courts Motion to Stay Order. re: appeal on Civil Action number: Case 3:22-00695-B consolidated with 3:21-CV-3129-B, (RE: related document(s) 81 Order on motion to abate, 100 Order on motion to dismiss adversary proceeding). Entered on 9/2/2022 (Whitaker, Sheniqua) (Entered: 11/29/2022)
	39	12/2/22	133	(15 pgs) Reply to (related document(s): 129 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 130 Response filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)
	40	12/7/22	135	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding filed by Defendant Highland Capital Management, LP). Hearing to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga for 122, (Annable, Zachery)
	41	12/7/22	136	(5 pgs) Notice of hearing filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Status Conference to be held on 1/25/2023 at 01:30 PM at https://us-courts.webex.com/meet/jerniga . (Annable, Zachery).
	42	12/9/22	138	(3 pgs) Response opposed to (related document(s): 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) filed by Defendant Highland Capital Management, LP. (Annable, Zachery)

Vol. 22 004745	43	12/9/22	139	(25 pgs) Brief in support filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Annable, Zachery)
Vol. 23 004770	44	12/9/22	140	(280 pgs; 8 docs) Support/supplemental document (<i>Appendix in Support of Highland Capital Management, L.P.'s Response to Renewed Motion to Withdraw the Reference</i>) filed by Defendant Highland Capital Management, LP (RE: related document(s) 138 Response). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 24 005050	45	12/16/22	144	(6 pgs) Reply to (related document(s): 138 Response filed by Defendant Highland Capital Management, LP) filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Sbaiti, Mazin)
005056 Thru Vol. 25.	46	1/23/23	145	(514 pgs; 15 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7 # 8 Exhibit 8 # 9 Exhibit 9 # 10 Exhibit 10 # 11 Exhibit 11 # 12 Exhibit 12 # 13 Exhibit 13 # 14 Exhibit 14) (Annable, Zachery)
Vol. 26 005570	47	1/23/23	146	(280 pgs; 8 docs) Witness and Exhibit List filed by Defendant Highland Capital Management, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5 # 6 Exhibit 6 # 7 Exhibit 7) (Annable, Zachery)
Vol. 27 005850	48	1/23/23	147	(221 pgs; 7 docs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 122 Motion to dismiss adversary proceeding (<i>Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint</i>)). (Attachments: # 1 Exhibit 1_Excerpts from July 14, 2020 Hearing Transcript # 2 Exhibit 2_HCLOF Members Agreement Relating to the Company # 3 Exhibit 3_HarbourVest Settlement Agreement # 4 Exhibit 4_Order Approving Debtor's Settlement with HarbourVest # 5 Exhibit 5_HCLOF Offering # 6 Exhibit 6 Amended and Restated Investment Advisory Agreement) (Sbaiti, Mazin)
006071	49	1/23/23	148	(3 pgs) Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188.). (Phillips, Louis)
Vol. 28 006074	50	1/25/23	150	(56 pgs; 2 docs) Amended Witness and Exhibit List filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP (RE: related document(s) 147 List (witness/exhibit/generic), 149 List (witness/exhibit/generic)). (Attachments: # 1 Exh 7_Testimony of Mark Patrick at June 8, 2021 hearing) (Sbaiti, Mazin)

Vol. 28 006130	51	1/25/23	152	(3 pgs) Notice of Appearance and Request for Notice by Louis M. Phillips filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP. (Phillips, Louis)
	52	1/25/23	154	(1 pg) Court admitted exhibits date of hearing January 25, 2023 (RE: related document(s) 128 Motion for withdrawal of reference, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (COURT ADMITTED DEFENDANT'S EXHIBITS #1, #2, #3, #4, #5 & #6 OFFERED BY ATTY GREG DEMO). (Edmond, Michael) (Entered: 01/27/2023)
Vol. 32 006925 006942 006960	53	2/6/23	158	Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023 (Okafor, Marcey)
	54	2/6/23	161	(18 pgs) DISTRICT COURT Notice of transmission of report and recommendation in re: renewed motion to withdraw reference. Civil Case # 3:22-cv-02802-S. (RE: related document(s) 158 Report and recommendation to the U.S. District Court by U.S. Bankruptcy Judge. (RE: related document(s) 128 Motion for withdrawal of reference filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.). Entered on 2/6/2023) (Whitaker, Sheniqua)
	55	4/3/23	165	(1 pg) DISTRICT COURT ORDER: The Court GRANTS the 11 Joint Motion to Transfer Proceeding and Consolidate Before Original Court and the above-numbered case (3:22-cv-02802-S) is transferred to the docket of the Honorable Judge Jane Boyle: Civil case 3:21-cv-00842-B (order referring case). (RE: related document(s) 1 Complaint filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd., 143 Notice of transmission of motion to withdraw reference). Entered on 4/3/2023 (Whitaker, Sheniqua) Modified on 4/10/2023 (Whitaker, Sheniqua). (Entered: 04/10/2023)

TRANSCRIPTS

006961	56	11/24/21	78	(104 pgs) Transcript regarding Hearing Held 11-23-2021 RE: Motion Hearing. THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 02/22/2022. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Liberty Transcripts/Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 75 Hearing held on 11/23/2021. (RE: related document(s) 55 MOTION to Stay filed by CLO Holdco Ltd, Charitable DAF Fund LP (Sbaiti, Mazin) (Entered: 08/26/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #55 ON 08/26/2021 IN U.S.
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			<p>DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied. Mr. Pomerantz to upload order.), 76 Hearing held on 11/23/2021. (RE: related document(s) 47 Motion to strike 43 Appendix in support filed by CLO Holdco, Ltd., Charitable DAF Fund, LP (Bridges, Jonathan) Modified text on 7/16/2021 (mjr). (Entered: 07/15/2021) [ORIGINALLY FILED IN 21-CV-0842 AS #47 ON 07/15/2021 IN U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION] (Okafor, M.)) (Appearances: J. Pomerantz and J. Morris for Highland Defendants; J. Jordan and P. Bessett for HCLOF; M. Sbaiti for Plaintiffs. Nonevidentiary hearing. Motion denied (Plaintiffs acknowledged complained-of Appendices it did not relate to Motion to Dismiss). Mr. Pomerantz to upload order.)). Transcript to be made available to the public on 02/22/2022. (Patel, Dipti)</p>
57	2/21/23	164	<p>164 (112 pgs) Transcript regarding Hearing Held 1/25/23 RE: HEARING ON DEFENDANT HIGHLAND CAPITAL MANAGEMENT L.P.'S RENEWED MOTION TO DISMISS COMPLAINT (122) AND STATUS CONFERENCE RE: MOTION FOR WITHDRAWAL OF REFERENCE FILED BY PLAINTIFF CLO HOLDCO, LTD., PLAINTIFF CHARITABLE DAF FUND, LP (128). THIS TRANSCRIPT WILL BE MADE ELECTRONICALLY AVAILABLE TO THE GENERAL PUBLIC 90 DAYS AFTER THE DATE OF FILING. TRANSCRIPT RELEASE DATE IS 05/22/2023. Until that time the transcript may be viewed at the Clerk's Office or a copy may be obtained from the official court transcriber. Court Reporter/Transcriber Dipti Patel, Telephone number 847-848-4907. (RE: related document(s) 155 Hearing held on 1/25/2023. (RE: related document(s) 122 Motion to dismiss adversary proceeding, (Defendant Highland Capital Management, L.P.'s Renewed Motion to Dismiss Complaint) filed by Defendant Highland Capital Management, LP filed by Defendant Highland Capital Management, LP) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court took matter under advisement.), 156 Hearing held on 1/25/2023. (RE: related document(s) 128 Motion for withdrawal of reference. Fee amount \$188, filed by Plaintiffs CLO Holdco, Ltd., Charitable DAF Fund, LP filed by Plaintiff Charitable DAF Fund, LP, Plaintiff CLO Holdco, Ltd.) (Appearances: J. Morris and G. Demo for Movants; L. Phillips and M. Sbaiti for Plaintiffs. Evidentiary hearing (appendices). Court announced it will recommend denial to District Court. Court is working on Report & Recommendation.)). Transcript to be made available to the public on 05/22/2023. (Patel, Dipti)</p>

Dated: July 14, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically through the Court's ECF system, which provides notice to all parties of interest, on this 14th day of July, 2023.

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**IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 DALLAS DIVISION**

CHARITABLE DAF FUND, L.P., AND CLO
 HOLDCO LTD.

Plaintiff,

vs.

HIGHLAND CAPITAL MANAGEMENT, L.P.,
 HIGHLAND HCF ADVISOR, LTD., AND
 HIGHLAND CLO FUNDING, LTD.

Defendants.

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Case No. 3:21-cv-00842-B

**DEFENDANT HIGHLAND CAPITAL MANAGEMENT, L.P.'S
 MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
AN ORDER TO ENFORCE THE ORDER OF REFERENCE**

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Highland Capital Management, L.P., a defendant in the above-captioned case (the “Debtor” or “Highland”), submits this memorandum of law (the “Memorandum”) in support of the *Debtor’s Motion for an Order to Enforce the Order of Reference* (the “Motion”). In support of its Motion, the Debtor states as follows:

PRELIMINARY STATEMENT¹

1. Highland is the debtor and debtor-in-possession in a bankruptcy case currently pending in the Bankruptcy Court for the Northern District of Texas, Dallas Division (the “Bankruptcy Court”), Case No. 19-34054-sgj11 (the “Bankruptcy Case”). The Bankruptcy Case has been pending since October 16, 2019, having been filed at the direction of James Dondero, who, on information and belief, is the person controlling and directing the actions of both The Charitable DAF Fund, L.P. (the “DAF”) and CLO Holdco, Ltd. (“CLOH” and together with the DAF, “Plaintiffs”) today. Both the DAF and CLOH have appeared and objected multiple times in the Bankruptcy Case.

2. In one of those matters, the Bankruptcy Court approved a settlement between the Debtor and HarbourVest² (the “Settlement”) pursuant to 11 U.S.C. §§ 105 and 363 of the Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) over the objections of CLOH, a Plaintiff in this action, as well as other entities owned and/or controlled by Mr. Dondero. The Settlement is on appeal.³

¹ Concurrently herewith, the Debtor is filing the *Appendix in Support of the Debtor’s Motion to Enforce the Reference* (the “Appendix”). Citations to the Appendix are notated as follows: Appx. #. The Complaint is Appx. 1.

² “HarbourVest” collectively refers to the following entities: HarbourVest 2017 Global Fund L.P., HarbourVest 2017 Global AIF L.P., HarbourVest Dover Street IX Investment L.P., HV International VIII Secondary L.P., HarbourVest Skew Base AIF L.P., and HarbourVest Partners L.P.

³ The Settlement is being appealed by Mr. Dondero’s two purported family investment trusts: The Dugaboy Investment Trust (“Dugaboy”) and The Get Good Trust (“Get Good” and together with Dugaboy, the “Trusts”). The Trusts, like Plaintiffs, are controlled by Mr. Dondero. The appeal and this litigation are just one battle in Mr. Dondero’s multifaceted litigation assault on the bankruptcy process.

3. Plaintiffs filed their *Original Complaint* (the “Complaint”)⁴ in this Court seeking to have this Court undertake a *de facto* appeal or reconsideration of the Settlement and to assert monetary claims for actions undertaken in the Bankruptcy Case. However, the *Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc* (the “Order of Reference”) (Appx. 2) in force in the Northern District of Texas required that this action be filed with the Bankruptcy Court presiding over the Bankruptcy Case. The Order of Reference was entered in 1984 and directs courts in this District to refer all proceedings arising under Title 11 and/or arising in or related to a case under Title 11 to the bankruptcy courts. A mandatory application of the Order of Reference prevents a race to the courthouse and inconsistent rulings by providing one forum to adjudicate *all* aspects of a bankruptcy case. Otherwise, debtors and creditors could blatantly forum shop and choose whether to file cases or claims in the bankruptcy court or the district court to evade what may be perceived as an unwelcoming court – which is precisely what has occurred in this case.⁵ Here, the case for enforcing the Order of Reference is compelling. The Complaint addresses issues that not only arise in, arise under, and relate to Title 11 but which have already been adjudicated by the Bankruptcy Court. By this Motion, the Debtor requests that this Court enforce the Order of Reference and refer the Complaint to the Bankruptcy Court for adjudication

4. The reason Plaintiffs filed the Complaint in this Court – rather than in the Bankruptcy Court – is obvious. Plaintiffs, under the direction of the Debtor’s ousted founder, Mr.

⁴ The Complaint contains a number of errors and material omissions, misstatements, misrepresentations, and mischaracterizations. The Debtor believes the Complaint is frivolous and should be dismissed on numerous grounds. The Debtor reserves all rights to contest the substance of the Complaint and intends to promptly inform Plaintiffs’ counsel that the Debtor will seek sanctions if the Complaint is not withdrawn.

⁵ Plaintiffs justify their conduct by contending that under the 1984 Amendments to the Bankruptcy Code, the Bankruptcy Court is a “unit” of this Court. Hence, in Plaintiffs’ minds, the courts are indistinguishable and interchangeable and Plaintiffs can pick and choose where to file. That is not the law and would render the Order of Reference a nullity.

Dondero, have found little traction in the Bankruptcy Court for the serial, frivolous, and vexatious litigation positions they have taken in more than a dozen pending matters in the Bankruptcy Case and their attempts to interfere with the Debtor's business operations – actions that have cost the Debtor millions. Plaintiffs therefore determined their best course of action was to engage in blatant forum shopping with the goal of re-opening settled litigation and closed factual records in a court Plaintiffs hope will be more hospitable.⁶ The Debtor will vigorously defend this action as (a) a flagrant attack on the Bankruptcy Court; (b) a frivolous attempt to avoid settled principles of bankruptcy jurisdiction through (less than) clever pleading; and (c) barred by *res judicata*. The Debtor have also sought to hold Plaintiffs and their counsel, among others, in civil contempt for attempting to add Mr. James P. Seery, Jr., the Debtor's independent, Bankruptcy Court-appointed CEO and CRO, as a defendant in this Case in clear violation of two final Bankruptcy Court orders.⁷

5. The fact that the Complaint was not automatically referred to the Bankruptcy Court is attributable to a blatant omission by Plaintiffs in Section VIII of their Civil Cover Sheet (Appx. 3). Because this action is undoubtedly “related to” the Bankruptcy Case and the pending appeal of the Settlement, Plaintiffs’ attorneys were required to disclose that a “related case” to the Complaint existed – as that term is used in the Local Civil Rules, effective September 1, 2020, of the Northern District of Texas (the “Local Rules”). Plaintiffs’ failure to make such disclosure could not have

⁶ The Complaint is not the first time that Plaintiffs have attempted to disenfranchise the Bankruptcy Court. On March 18, 2021, Mr. Dondero, Plaintiffs, and other entities owned and/or controlled by Mr. Dondero filed *James Dondero, Highland Capital Management Fund Advisors, L.P., NexPoint Advisors, L.P., The Dugaboy Investment Trust, The Get Good Trust, and NexPoint Real Estate Partners, LLC, f/k/a HCRE Partners, LLC, a Delaware Limited Liability Company's Motion to Recuse Pursuant to 28 U.S.C. § 455* [Docket No. 2060] (the “Recusal Motion”) pursuant to which they sought to recuse the Honorable Stacey Jernigan from the Bankruptcy Case. The Recusal Motion was denied by the Bankruptcy Court and has been appealed [Docket No. 2149].

⁷ On April 19, 2021, filed *Plaintiff's Motion for Leave to File First Amended Complaint in the District Court* (the “Seery Motion”) in this Court seeking leave to add Mr. Seery as a defendant, and, in response, on April 23, 2021, the Debtor filed *Debtor's Motion for an Order Requiring the Violators to Show Cause Why They Should Not Be Held in Civil Contempt for Violating Two Court Orders* [Docket No. 2247] (the “Contempt Motion”). The Bankruptcy Court ordered Plaintiffs, among others, to appear at an in person hearing on June 8, 2021, to show cause why they should not be held in contempt [Docket No. 2255] (the “Show Cause Order”).

been inadvertent. And Plaintiffs have also not been candid with the Bankruptcy Court. On May 14, 2021, Plaintiffs filed a response to the Show Cause Order inaccurately claiming they had made full disclosure to this Court.⁸

6. The Bankruptcy Court is the appropriate tribunal to address the Complaint as it clearly “arises under, arises in or relates to the Debtor’s Chapter 11 case and the Settlement. The Court should send Plaintiffs a strong message that (a) such gamesmanship is not acceptable; (b) the Order of Reference will be enforced; and (c) the Complaint will be immediately sent to the Bankruptcy Court where it belongs.

FACTUAL BACKGROUND

A. Plaintiffs’ Ownership and Control

7. Plaintiffs are controlled and/or directed by Mr. Dondero, the Debtor’s ousted founder.⁹ CLOH is an entity wholly owned and controlled by the DAF. Until at least mid-January 2021, Grant Scott, Mr. Dondero’s life-long friend and college roommate, was the sole director of the DAF and of CLOH (neither of which otherwise had any officers or employees).¹⁰ As found by the Bankruptcy Court, Mr. Dondero has engaged in a coordinated litigation campaign against the Debtor both directly and through his related entities, including Plaintiffs, with the goal of

⁸ See *Response of the Charitable DAF Fund, L.P., CLO Holdco, Ltd., and Sbaiti & Company PLLC to Show Cause Order* [Docket No. 2313], pg. 3 (the “Bankruptcy Response”) (Appx. 28). In the Bankruptcy Response, Plaintiffs prognosticate about how this Court would rule: “... [the Debtor] seem[s] to have assumed that the Motion for Leave would be granted, and that the proposed amended complaint naming Seery would be referred to [the Bankruptcy] Court for a report and recommendation.” Appx. 28 at p. 12. If that were the case, Plaintiffs should have just filed in the Bankruptcy Court or, at the very least, disclosed the Bankruptcy Case in the Civil Cover Sheet.

⁹ Mr. Dondero also controls, and has appeared in the Bankruptcy Case, through, among others, his two family investment trusts: Dugaboy and Get Good.

¹⁰ Mr. Scott previously testified during a sworn deposition in the Bankruptcy Case that he had little knowledge of the investment and other activities of the DAF and CLOH and was effectively taking direction from Mr. Dondero with respect to their activities. Appx. 27, 11:10-25; 12:1-25; 13:1-25; 14:1-25; 15:1-25; 16:1-17.

10. On December 23, 2020, the Debtor filed its *Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith* [Docket No. 1625]¹⁴ (the “Settlement Motion”), pursuant to which the Debtor sought Bankruptcy Court approval of the Settlement with HarbourVest pursuant to 11 U.S.C. §§ 105(a) and 363 and Bankruptcy Rule 9019. Appx. 7. The Debtor concurrently filed the proposed *Settlement Agreement and Transfer Agreement for Ordinary Shares of Highland CLO Funding, Ltd.* (the “Transfer Agreement”) [Docket No. 1631-1]. Appx. 8. The Settlement Agreement expressly provided that it was subject to Bankruptcy Court approval. Appx. 7, ¶ 3.

11. Among the material terms of the Settlement was that HarbourVest would transfer its interest in Highland CLO Funding, Ltd. (“HCLOF”) to the Debtor or its nominee (the “Transfer”). The Transfer was a necessary component of the Settlement. HarbourVest believed the misrepresentations entitled it to a rescission of its Investment, and HarbourVest wanted to extract itself from the Highland platform. The Settlement also provided HarbourVest with (a) an allowed, general unsecured claim in the amount of \$45 million, (b) a subordinated, allowed, general

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unsecured claim in the amount of \$35 million, and (c) other consideration more fully described in the Settlement Agreement. *See* Appx. 7, ¶ 32.

12. The Settlement Motion fully disclosed all aspects of the Transfer, including (a) what HarbourVest was transferring; (b) the valuation (and method of valuation) of the asset being transferred to the Debtor; and (c) the method of the Transfer. (Appx. 7, ¶¶ 1(b) 32, 32 n.5; Appx. 8). Three objections were lodged against the proposed Settlement, all of which were filed by Mr. Dondero or entities controlled by him, including Plaintiff CLOH and Dondero's Trusts. Each of those objections was coordinated by Mr. Dondero.¹⁵

D. Plaintiffs Knew of the Transfer, and Plaintiff CLOH Objected to the Settlement

13. On January 6, 2021, Mr. Dondero filed his *Objection to Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest* [Docket No. 1697] (Appx. 9) contending, among other things, that the Settlement: (a) was not "reasonable or in the best interests of the estate" because the Debtor was ***grossly overpaying*** and (b) amounted to "a blatant attempt to purchase votes in support of the Debtor's plan." *Id.*, ¶ 1. Mr. Dondero did not directly challenge the Transfer but made clear that he knew exactly what was being transferred and the valuation being placed on it: "As part of the settlement, HarbourVest will [] transfer its entire interest in [HCLOF] to an entity to be designated by the Debtor. The Debtor states that the value of this interest is approximately \$22 million as of December 1, 2020." *Id.*, ¶ 1, n.3.

14. On January 8, 2021, Dondero's Trusts filed their *Objection to the Debtor's Motion for Entry of an Order Approving Settlement with HarbourVest (Claim Nos. 143, 147, 149, 150, 153, 154) and Authorizing Actions Consistent Therewith*. [Docket No. 1706]. (Appx. 10) Like Mr. Dondero, the Trusts made clear that they knew of the proposed Transfer and its valuation. But,

¹⁵ *See Debtor's Amended Witness and Exhibit List with Respect to Evidentiary Hearing to be Held on January 8, 2021* [Adv. Proc. 21-03190-sgj, Docket No. 46], Exhibit Q.

unlike Mr. Dondero, the Trusts directly questioned (a) whether HarbourVest had the right to effectuate the Transfer, and (b) the valuation of the HCLOF interests – matters which are directly at issue in the Complaint.

15. Finally, and notably, on January 8, 2021, Plaintiff CLOH – presumably at the direction of its parent, the DAF – filed its *Objection to HarbourVest Settlement* [Docket No. 1707]. (Appx. 11) In its objection, CLOH challenged (as it does again in the Complaint) HarbourVest’s right to implement the Transfer contending, among other things, that: (a) CLOH and the other members of HCLOF had a “Right of First Refusal” under the Members Agreement (*Id.*, ¶ 3) and (b) “HarbourVest has no authority to transfer its interest in HCLOF without first complying with the Right of First Refusal” (*Id.*, ¶ 6). In support of these contentions, CLOH offered a lengthy analysis of the Members Agreement, including CLOH’s purported “Right of First Refusal” under Section 6.2 thereof. *Id.*, ¶¶ 9-22.

E. The Dondero Parties Exercised their Right to Take Discovery

16. By objecting to the Settlement Motion, Mr. Dondero, the Trusts, and CLOH (collectively, the “Dondero Objectors”) initiated a “contested matter” under Bankruptcy Rule 9014¹⁶ and, accordingly, had the unfettered right to conduct discovery under Bankruptcy Rule 9014(c).¹⁷ Thus, for example, the Dondero Objectors had the right to request documents from, and take the depositions of, the Debtor, HarbourVest, HCLOF, and/or Highland HCF Fund Advisor,

¹⁶ See also Local Bankruptcy Rules of the United States Bankruptcy Court for the Northern District of Texas 9014-1(a) (“a response is required with respect to a contested matter”).

¹⁷ The Debtor filed the Settlement Motion on December 23, 2020, and set the hearing on the motion for January 14, 2021 [Docket No. 1626]. The DAF and CLOH allege that the Debtor “set the hearing right after the Christmas and New Year’s holidays, almost ensuring that no party would have the time to scrutinize the underpinnings of the deal.” Appx. 1, ¶ 30. This is a bald lie (one of many) and absurd. The undisputed facts are that (a) the Settlement Motion was filed on regular notice; (b) no one requested or moved for an extension of the hearing date; and (c) no one contended they had insufficient time to “scrutinize the underpinnings of the deal” (at least until the filing of the Complaint).

Reply”). Appx. 13. The Omnibus Reply set forth an extensive rebuttal to CLOH’s flawed argument that the Transfer could not be completed without HCLOF’s other members being offered HarbourVest’s interest in HCLOF, as allegedly required by the “Right of First Refusal” under Section 6.2. *Id.*, ¶¶ 26-39. Both HCLOF – which was independently represented – and HarbourVest agreed with the Debtor’s conclusions that the Members Agreement did not require HarbourVest to offer its interests to CLOH or any other member of HCLOF. *Id.*, ¶ 37. At the January 14, 2021, hearing, CLOH ***voluntarily withdrew*** its objection after reading the Debtor’s analysis of the Members Agreement:

CLO Holdco has had an opportunity to review the reply briefing, and . . . [b]ased on our analysis of Guernsey law and some of the arguments of counsel on those pleadings and our review of the appropriate documents, I obtained authority from my client, Grant Scott, as trustee for CLO Holdco, ***to withdraw the CLO Holdco objection based on the interpretation of the member agreement.***

Appx. 14 at 7:20-8:6 (emphasis added). Following CLOH’s withdrawal of its objection, the Trusts also abandoned their challenge to the Transfer. *Id.* at 22:5-20.

20. The Debtor called two witnesses in support of the Settlement Motion, Mr. Seery and Mr. Pugatch. Counsel for Mr. Dondero and the Trusts cross-examined the Debtor’s witnesses but did not inquire about the value of the HCLOF interests, the Debtor’s fiduciary obligations, or the Transfer (except for a line of questioning concerning which entity would hold the HCLOF interests on behalf of the Debtor). *Id.*, at 87:18-89:21. At the conclusion of the hearing, the Court entered an order overruling the remaining objections and approving the Settlement [Docket No. 1788] (the “Settlement Order”). Appx. 15.

21. The Settlement Order ***expressly*** authorized the transfer of HarbourVest’s interest in HCLOF providing, in relevant part, that “[p]ursuant to the express terms of the [Members Agreement] . . . HarbourVest is authorized to transfer its interest in HCLOF . . . ***without the need to obtain the consent of any party or to offer such interests first to any other investor in***

other duties requiring it to provide Plaintiffs with the opportunity to acquire HarbourVest's interest in HCLOF. *See, e.g.*, Appx. 1, ¶¶ 36, 49. Plaintiffs also assert claims for breach of fiduciary duty, breach of contract, negligence, violation of RICO, and tortious interference.

24. In the Complaint, Plaintiffs recite certain facts relating to HarbourVest's Claims and the process by which the Debtor obtained Bankruptcy Court approval (*Id.*, ¶¶ 16-31) but disclose none of the undisputed facts set forth above. Plaintiffs also do not disclose that they – through their relationship to Mr. Dondero – had the same information concerning the value of the HarbourVest interests that Mr. Seery allegedly had. Finally, they do not even attempt to justify why they are seeking, in this Court, to re-litigate a Bankruptcy Court order.

H. Counsel for the DAF and CLOH Willfully Ignore the Gatekeeper Orders

25. Throughout the Complaint, Plaintiffs threatened to name Mr. Seery as a defendant,²² and indeed, on April 19, 2021, just four days after filing the Complaint, Sbaiti & Co. (“Sbaiti”), the newly-retained counsel for the DAF and CLOH, advised the Debtor's counsel that they “intend to move for leave today in the district court seeking permission to amend our complaint to add claims against Mr. Seery. They are the same causes of action. We believe we are entitled to amend as a matter of course.” Counsel asked whether they could “put your client down as unopposed?” Appx. 17. In response, the Debtor informed Sbaiti of the two “Gatekeeper Orders” (defined below), which prohibited this action, provided copies, and told them, among other things, that “[i]f you proceed to amend the complaint as you suggest [] without first obtaining Bankruptcy Court approval we reserve all rights to take appropriate action and seek appropriate relief from the

²² By way of example only, Plaintiffs refer to Mr. Seery as a “potential party” and suggest that he had access to and wrongfully utilized “superior non-public information” and lied under oath about the value of the asset subject to the Transfer in his testimony to the Bankruptcy Court. Appx. 1, at Introduction, ¶¶ 6, 43-44.

Bankruptcy Court.” *Id.* Later that evening, Sbaiti confirmed their intention to seek leave from this Court to sue Mr. Seery and, on April 19, 2021, filed the Seery Motion. Appx. 18.

26. Both Gatekeeper Orders are plain, unambiguous, and final. On January 9, 2020, the Bankruptcy Court, ***with Mr. Dondero’s consent and agreement***, entered the *Order Approving Settlement with Official Committee of Unsecured Creditors Regarding Governance of the Debtor and Procedures for Operations in the Ordinary Course* [Docket No. 339] pursuant to **11 U.S.C. §§ 105 and 363** and Rule 9019 (the “January Order”). Appx. 19. Pursuant to the January Order, Mr. Dondero surrendered control of the Debtor and the Independent Board was appointed. To protect the Independent Board and its agents from frivolous litigation (primarily from Mr. Dondero and his related entities), the Debtor asked for, and the Bankruptcy Court included in the January Order (without objection), a “gatekeeper” provision stating in pertinent part:

No entity may commence or pursue a claim or cause of action of any kind against any Independent Director, any Independent Director’s agents, or any Independent Director’s advisors relating in any way to the Independent Director’s role as an independent director of Strand without the Court (i) first determining the Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Independent Director, any Independent Director’s agents, or any Independent Director’s advisors and (ii) specifically authorizing such entity to bring such claim. The Court will have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Id., ¶ 10. Mr. Seery is protected under the January Order as a member of the Independent Board and as the Debtor’s CEO and CRO – an agent of the Independent Board. The January Order provided that the Bankruptcy Court “shall retain jurisdiction over all matters arising from or related to the interpretation and implementation of this Order. . . .”). *Id.*, ¶ 13.

27. Seven months later, the Debtor sought Bankruptcy Court approval to appoint Mr. Seery as the Debtor’s CEO and CRO. After an evidentiary hearing, the Bankruptcy Court granted the motion (without objection) and entered its *Order Approving Debtor’s Motion Under*

Bankruptcy Code Sections 105(a) and 363(b) for Authorization to Retain James P. Seery, Jr., as Chief Executive Officer, Chief Restructuring Officer and Foreign Representative Nunc Pro Tunc To March 15, 2020 [Docket No. 854] pursuant to 11 U.S.C. §§ 105(a) and 363(b) (the “July Order” and with the January Order, the “Gatekeeper Orders”). Appx. 20. Like the January Order, the July Order included a “gatekeeper” provision:

No entity may commence or pursue a claim or cause of action of any kind against Mr. Seery relating in any way to his role as the chief executive officer and chief restructuring officer of the Debtor without the Bankruptcy Court (i) first determining after notice that such claim or cause of action represents a colorable claim of willful misconduct or gross negligence against Mr. Seery, and (ii) specifically authorizing such entity to bring such claim. The Bankruptcy Court shall have sole jurisdiction to adjudicate any such claim for which approval of the Court to commence or pursue has been granted.

Id., ¶ 5. The Bankruptcy Court “retain[ed] jurisdiction over any and all matters arising from or related to the interpretation and/or implementation of [the July] Order.” *Id.*, ¶ 8.

28. The Gatekeeper Orders are final orders, *res judicata*, and law of the case. *See* Appx. 5, ¶ 73 (finding that the Gatekeeper Orders “constitute[] law of this case and are *res judicata* pursuant to *In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987)”).

29. The Gatekeeper Orders also featured heavily at the Plan confirmation hearing. CLOH initially objected to the Plan, which Mr. Dondero and his proxies, including CLOH, contested.²³ In the Confirmation Order, the Bankruptcy Court provided the rationale for, and purpose of, the “gatekeeper” provisions in the Gatekeeper Orders (Appx. 5, ¶¶ 12-14) and expressly found that a “gatekeeper” provision was needed in the Plan because “Mr. Dondero and his related entities will likely commence litigation . . . after the Effective Date and do so in jurisdictions other than the Bankruptcy Court in an effort to obtain a forum which Mr. Dondero perceives will be more hospitable to his claims” (Appx. 5, ¶ 78). Despite this clear finding and

²³ Mr. Dondero and a number of his related entities are currently appealing the Confirmation Order.

order, Plaintiffs filed the Seery Motion to add Mr. Seery as a defendant and asked this Court to disregard the Gatekeeper Orders. Although this Court denied the Seery Motion, it stated “Plaintiffs may renew their motion after Defendants are served and have appeared” leaving open the possibility that Plaintiffs may still attempt to add Mr. Seery.²⁴ Appx. 21.

30. In response, on April 23, 2021, the Debtor filed the Contempt Motion in the Bankruptcy Court for an order to show cause as to why Plaintiffs should not be held in contempt. Appx. 24. Plaintiffs then filed a motion in the Bankruptcy Court purporting to seek reconsideration of the July Order [Docket No. 2248] (the “Motion for Reconsideration”).²⁵ Appx. 25. The Bankruptcy Court ordered Plaintiffs, among others, to appear at an in person hearing on June 8, 2021,²⁶ to show cause why they should not be held in contempt. Appx. 26.

31. Finally, on May 14, 2021, Plaintiffs filed the Bankruptcy Response in which they argue that they followed the Gatekeeper Orders by filing the Complaint in this Court rather than the Bankruptcy Court because seeking to amend the Complaint to add Mr. Seery as a defendant was not “pursuing” a claim (as used in the Gatekeeper Orders). Appx. 28 at 13.

ARGUMENT

A. Plaintiffs Violated Local Rule 3.3(a) By Failing to Disclose the Bankruptcy Case

32. When Plaintiffs filed the Complaint, thereby initiating the action, their counsel was required to complete a Civil Cover Sheet, Section VIII of which required them to disclose whether there were any “related cases.” Local Rule 3.3(a) requires that “[w]hen a plaintiff files a complaint and there is a related case . . . the complaint must be accompanied by a notice of related case.” A

²⁴ If Mr. Seery incurs any costs defending or preparing to defend against Plaintiffs’ action, Mr. Seery will be entitled to indemnification directly from the Debtor under the Debtor’s limited partnership agreement (Appx. 22, § 4.1(h)) and indirectly through the Strand’s indemnification obligations and the Debtor’s guarantee of such obligations (Appx. 23).

²⁵ The Contempt Motion and the Motion for Reconsideration were re-docketed on April 27, 2021, without any changes.

²⁶ The hearing on the Show Cause Order will be the first in person hearing since March 2020.

“related case” is defined in pertinent part as a proceeding that “arises from a common nucleus of operative fact with the case being filed or removed, regardless whether the related case is a pending case. . . .” Local Rule 3.3(b)(3). As discussed above, although the Complaint asserts claims based on the same facts as the HarbourVest Settlement approved over Plaintiffs’ objection by the Bankruptcy Court, the Civil Cover Sheet makes no mention of the Bankruptcy Case as a “related case.” It merely describes the nature of the Complaint as one arising under RICO. Yet the Bankruptcy Case is indisputably related to this one.²⁷ Plaintiffs’ failure to disclose the existence of a related case violates the Local Rules. *See Kuzmin v. Thermaflo, Inc.*, 2:07-CV-00554-TJW, 2009 U.S. Dist. LEXIS 42810, at *4-7 (E.D. Tex. May 20, 2009) (finding party violated court’s local rules where they failed to indicate on civil cover sheet that case was “related to” other cases).

B. The Complaint Should Be Automatically Referred to the Bankruptcy Court

i. The Complaint Should Be Heard in the Bankruptcy Court.

33. Jurisdiction of “all civil proceedings arising under title 11, or arising in or related to cases under title 11” is conferred on district courts. 11 U.S.C. §§ 1334(a), (b). District courts, in turn, may refer proceedings to the bankruptcy courts. 28 U.S.C. § 157(a) (“Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”). On August 3, 1984, this Court entered the Order of Reference, which provides, in pertinent part: “*any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 . . . be and they hereby are referred to the*

²⁷ Under 28 U.S.C. § 1334(a), this Court has original and exclusive jurisdiction over the Bankruptcy Case. Pursuant to 28 U.S.C. § 157 and the Order of Reference, this Court has referred matters in the Bankruptcy Case to the Bankruptcy Court. It is thus clear that the Bankruptcy case is pending in this District pursuant to this Court’s jurisdiction, and as noted above the matters alleged in the Complaint related directly to litigated proceedings involving Plaintiffs and the Debtor in the Bankruptcy Case. These facts require appropriate disclosure in the Civil Cover Sheet.

Bankruptcy Judges of this district for consideration and resolution consistent with law.” Appx.

2 (emphasis added). The Order of Reference therefore refers the following proceedings:

- **Proceedings “arising under Title 11”:** A proceeding “arises under” Title 11 if it is a “cause of action created or determined by a statutory provision of title 11.” *Wood v. Wood (In re Wood)*, 825 F.2d 90, 96 (5th Cir. 1987).
- **Proceedings “arising in . . . a case under Title 11”:** A proceeding “arises in” Title 11 if it deals with “administrative matters that arise *only* in bankruptcy cases.” *Wood*, 825 F.2d at 96 (emphasis in original).²⁸
- **Proceedings “related to a case under Title 11”:** A proceeding “relates to” a case under Title 11 if “the outcome of [the non-bankruptcy] proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Burch v. Freedom Mortg. Corp. (In re Burch)*, 835 Fed. Appx. 741, 748 (5th Cir. 2021) (internal citations omitted); *see also Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (“Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal. . . with all matters connected with the bankruptcy estate”). A proceeding “relates to” a proceeding under Title 11 even if it arises from postpetition conduct if “it affects the estate, not just the debtor.” *Wood*, 825 F.2d at 94.

ii. The Order of Reference is Mandatory.

34. Under the plain language of the Order of Reference, “all proceedings under Title 11 or arising or related to a case under Title 11” are ***automatically*** referred to the bankruptcy courts, and the Debtor respectfully submits that the Order of Reference is mandatory. *See Uralkali Trading, S.A. v. Sylvite Southeast, LLC*, 2012 U.S. Dist. LEXIS 40455, at *3 (M.D. Fla. Mar. 26, 2012) (finding that a substantially similar order of reference in the Middle District of Florida “mandate[d]” referral to the appropriate bankruptcy court); *Welch v. Regions Bank*, 2014 U.S. Dist. LEXIS 96175, at *5 (M.D. Fla. July 15, 2014) (“[T]his Court has declared the enforcement of the Standing Order of Reference mandatory”). The fact that 11 U.S.C. §§ 1334 confers original jurisdiction on the district court does not change this requirement as district courts and bankruptcy

²⁸ Proceedings arising under and arising in Title 11 are “core proceedings” under 28 U.S.C. § 157(b). *Wood*, 825 F.2d at 96 (“[T]he phrases ‘arising under’ and ‘arising in’ are helpful indicators of the meaning of core proceedings. If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding. . . If the proceeding is one that would arise only in bankruptcy. It is also a core proceeding. . .”).

courts are distinct. *Villegas v. Schmidt*, 788 F.3d 156, 159 (5th Cir. 2015) (“Additionally, every other circuit to address the issue has maintained the distinction between the bankruptcy court and the district court, holding that ‘a debtor must obtain leave of the bankruptcy court before initiating an action in district court when the action is against the trustee or other bankruptcy-court-appointed officer, for acts done in the actor’s official capacity’”) (citations omitted).

iii. Any Disputes Over the Settlement or the Transfer Arise Under, Arise In, and Relate to Title 11 and are Core Proceedings.

35. It is black letter law that the determination of whether to approve a settlement of a claim is a “core proceeding” and arises in and under Title 11. The statutory predicates for relief are 11 U.S.C. §§ 105 and 363 and under Rule 9019, which are “created by the federal bankruptcy law” and “arise only in bankruptcy.” *Wood*, 825 F.2d at 96; see also, e.g., *In re Idearc, Inc.*, 423 B.R. 138, 177 (Bankr. N.D. Tex. 2009) (finding approval of a settlement under Bankruptcy Rule 9019 was a “core proceeding” under 28 U.S.C. § 157(b)); *In re Margaux City Lights Partners, Ltd.*, 2014 Bankr. LEXIS 4841 at *6 (Bankr. N.D. Tex. Nov. 24, 2014) (same); Settlement Order, ¶ 2 (same). The HarbourVest Settlement also involved the allowance of HarbourVest’s Claims – a black letter core proceeding under 28 U.S.C. § 157(b)(2)(B) (“Core proceedings include, but are not limited to – (B) allowance of disallowance of claims against the estate. . .”).

36. Since the Complaint seeks to re-litigate the HarbourVest Settlement and to re-open the Bankruptcy Court’s factual record, it is seeking a ruling from this Court as to the merits of the HarbourVest Settlement and/or to litigate matters that arose from the same operative facts as the HarbourVest Settlement – in each case, a core proceeding arising in and under Title 11. If the Settlement Order or the Transfer is to be re-assessed it must be by the Bankruptcy Court under the Bankruptcy Code and Bankruptcy Rules. This Court should enforce the Order of Reference and refer the Complaint to the Bankruptcy Court. See *Burch*, 835 Fed. Appx. at 748 (“Each of Burch’s

state-court claims is premised on his interpretation of a Chapter 11 bankruptcy order, and so each arises from or is related to his Title 11 bankruptcy proceedings.”).

37. Further, the Bankruptcy Court specifically retained jurisdiction in the Settlement Order to adjudicate all disputes arising from the implementation of the Settlement Order, including the Transfer of the HCLOF interests, and therefore retained jurisdiction to hear the Complaint. *Id.* ¶7. Even if jurisdiction had not been explicitly retained, the Bankruptcy Court, like all federal courts, has jurisdiction to interpret and enforce its own orders. *Rodriguez v. EMC Mortgage Corp.* (*In re Rodriguez*), 2001 U.S. App. LEXIS 30564, at *5 (5th Cir. Mar. 15, 2001); *In re Galaz*, 841 F.3d 316, 322 (5th Cir. 2016); *Angel v. Tauch (In re Chiron Equities, LLC)*, 552 B.R. 674, 684 (Bankr. S.D. Tex. 2016). The Complaint, which seeks to challenge the Transfer and re-litigate the Settlement Order, is therefore itself a core proceeding arising in and under Title 11 and should be heard in the Bankruptcy Court.

iv. Any Disputes Over the Gatekeeper Orders Arise Under, Arise In, and Relate to Title 11 and Are Core Proceedings.

38. The Seery Motion was denied, and Mr. Seery has not been added as a defendant in this Case. Plaintiffs have also filed the Motion for Reconsideration in the Bankruptcy Court. However, to the extent Plaintiffs seek to add Mr. Seery as a defendant in this Case, any such proceedings must be referred to the Bankruptcy Court for the reasons forth in Section B(iii) *supra*. Like the Settlement Order, the January Order is the result of a settlement with the Committee approved under 11 U.S.C. §§ 105 and 363 and Bankruptcy Rule 9019. The “gatekeeper” provision in the January Order was also a required component of that settlement and the settlement would not have been approved without it. *See* Appx. 5, ¶ 12-14. Similarly, the July Order was the result of a motion seeking authority to appoint Mr. Seery as CEO and CRO under 11 U.S.C. §§ 105(a) and 363(b), an administrative action that only exists in Title 11 and thus “arises in” and “arises

under” Title 11. Like the January Order, the “gatekeeper” provision in the July Order was a required component of Mr. Seery’s appointment. *Id.* Any attempt to add Mr. Seery as a defendant would be re-litigating a core proceeding arising under, arising in, and related to Title 11.

v. The Complaint Impacts Creditor Recoveries.

39. The Debtor’s Plan provides for the orderly monetization of the Debtor’s assets and the distribution of the proceeds to creditors. Because the Plan is an asset monetization plan, distributions depend on two things: (a) the total amount of allowed claims against the estate and (b) the cash available to pay those claims. Consequently, the Complaint will have a material and immediate impact on the Debtor’s estate. *First*, any judgment secured by Plaintiffs against the Debtor will decrease the cash available to pay the Debtor’s prepetition creditors (which cash is property of the estate under 11 U.S.C. § 541). *Second*, any delay in determining the amount owed to HarbourVest or the amount owed by the Debtor to Plaintiffs will delay payments to creditors under the Plan as the Debtor will need to reserve against such claims. This impact on creditors and the Debtor’s ability to satisfy its obligations under the Plan clearly impacts the Debtor’s estate and should be adjudicated by the Bankruptcy Court. *Zale*, 62 F.3d at 753 (“Those cases in which courts have upheld ‘related to’ jurisdiction over third-party actions do so because the subject of the third party dispute is property of the estate, or because the dispute over the asset would have an effect on the estate.”); *see generally Centrix Fin. Liq. Trust v. Sutton*, 2019 U.S. Dist. LEXIS 154083 (D. Colo. Sept. 10, 2019) (finding that in a liquidating plan, the bankruptcy court has “related to” jurisdiction over all matters that impact distributions from the liquidating trust).

vi. Mr. Seery Will Have Indemnification Claims Against the Estate.

40. This Court denied the Seery Motion without prejudice, but if Mr. Seery is ever added as a defendant or is compelled to retain personal counsel because of the completely unfounded and false allegations in the Complaint, Mr. Seery will have the right to indemnification

from the estate. See ¶ n.24 *supra*. The cost of this indemnification will immediately decrease the amount available to creditors and will delay distributions. Again, this clearly “relates to” to the Debtor’s bankruptcy. See, e.g., *Collins v. Sidharthan (In re KSRP, Ltd.)*, 809 F.3d 263, 266-67 (5th Cir. 2015) (finding that bankruptcy court had jurisdiction because of potential indemnification claims even though bankruptcy court ultimately determined the indemnification claims were invalid); *Refinery Holdings Co., L.P. v. TRMI Holdings, Inc. (In re El Paso Refinery, L.P.)*, 302 F.3d 343, 349 (5th Cir. 2002) (finding “related to” jurisdiction when “RHC’s claim against Texaco could conceivably have an effect on the Estate in light of the chain of indemnification provisions beginning with Texaco and leading directly to the Debtor.”); *Houston Baseball Partners, LLC v. Comcast Corp. (In re Houston Reg’l Sports Network)*, 2014 Bankr. LEXIS 2274, at *15-25 (Bankr. S.D. Tex. May 22, 2013).

C. There is No Basis for a Mandatory Withdrawal of the Reference

41. In the Seery Motion, Plaintiffs cite 28 U.S.C. § 157(d) for the proposition that bankruptcy courts are “prohibit[ed] . . . absent the parties consent, from presiding over cases or proceedings that require consideration of both Title 11 and other federal law regulation organizations or activities affecting interstate commerce.” Appx. 18, at 7. Plaintiffs argue that, because they pled causes of action arising under the Advisers Act and RICO, this Court will have to withdraw the reference. Plaintiffs make the same argument in the Bankruptcy Response: “Respondents expected that the motion for leave [to amend] would likely be referred to [the Bankruptcy] Court for a report and recommendation. And Respondents planned, if necessary, to move to withdraw the reference. . . .” Appx. 28 at 12.

42. Even assuming Plaintiffs’ federal law claims are not frivolous (and they are), Plaintiffs misinterpret 28 U.S.C. § 157(d)’s applicability to this case. 28 U.S.C. § 157(d) provides for mandatory withdrawal of the reference in certain instances: “The district court shall, on timely

motion of a party, so withdraw the proceeding if . . . resolution of the proceeding *requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.*” 28 U.S.C. § 157(d) (emphasis added). However, in interpreting Section 157(d), courts in this Circuit apply the majority view and require withdrawal of the reference only:

[W]hen “substantial and material consideration” of a federal statute other than the Bankruptcy Code is necessary to the resolution of a case or proceeding. Withdrawal is not mandatory in cases that require only the “straightforward application of a federal statute to a particular set of facts.” Rather, withdrawal is in order only when litigants raise “issues requiring significant interpretation of federal laws that Congress would have intended to [be] decided by a district judge rather than a bankruptcy judge.”

Southern Pac. Transp. v. Voluntary Purchasing Groups, 252 B.R. 373, 382 (E.D. Tex. 2000) (quoting *In re National Gypsum*, 14 B.R. 188, 192-93 (N.D. Tex. 1991). As such, even the presence of a substantial federal question is not a basis for mandatory withdrawal; mandatory withdrawal is only proper when a bankruptcy court would have to interpret and apply federal law on a novel and unsettled question. See *Beta Operating Co., LLC v. Aera Energy, LLC (In re Memorial Prod. Partners)*, 2018 U.S. Dist. LEXIS 161159, at *9 (S.D. Tex. Sept. 20, 2018); *UPH Holdings, Inc. v. Sprint Nextel Corp.*, 2013 U.S. Dist. LEXIS 189349, at *4 (W.D. Tex. Dec. 10, 2013) (holding no mandatory withdrawal when, among other reasons, “the Bankruptcy Court will be tasked with ‘no more than application of federal communications law to a given set of facts.’”) (citations omitted). Finally, “mandatory withdrawal is to be applied narrowly to ensure bankruptcy cases are litigated in the bankruptcy courts and to prevent 157(d) from becoming an ‘escape hatch’ from litigating cases under the Bankruptcy Code.” See, e.g., *Manila Indus., Inc. v. Ondova Ltd. (In re Ondova Ltd.)*, 2009 U.S. Dist. LEXIS 102134, at *6 (N.D. Tex. Oct. 1, 2009) (quoting *In re G-I Holdings, Inc.*, 295 B.R. 211, 221 (D. N.J. 2003)).

43. None of the putative federal causes of action raised by Plaintiffs require “substantial and material consideration” of a federal statute or more than the cursory application of settled federal law. In fact, most can be summarily dismissed as they either grossly misinterpret settled law, based on materially misstated facts, or assert causes of action that belong to other parties.

D. The Complaint Is Barred by the Doctrine of *Res Judicata*

44. The doctrine of *res judicata* protects the finality of judgements by preventing litigants from re-litigating the same issues over and over again. “[R]es judicata has four elements: (1) the parties are identical or in privity; (2) the judgment. . . was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions.” *Comer v. Murphy Oil USA*, 718 F.3d 460, 467 (5th Cir. 2013). Each of those elements is satisfied here, and the Complaint is barred by *res judicata*. Plaintiffs had their opportunity to challenge these orders; they do not get a second bite at the apple or to re-litigate these issues in a different forum.

45. As set forth above, the parties are identical. Plaintiffs had the right to object to the HarbourVest Settlement and the Transfer of the HarbourVest interests, and Plaintiffs (a) actually objected to the Settlement Motion arguing that they had a “Right of First Refusal” under the Members Agreement; (b) had the right to take discovery on all issues, including the value of the HarbourVest interests; (c) could have objected based on the Advisers Act or RICO; (d) deposed HarbourVest’s 30(b)(6) witness; and (e) ***withdrew their objection once they realized that they did not have a “Right of First Refusal.”*** The Bankruptcy Court also indisputably had jurisdiction over the matter. Although the Settlement Order is being appealed by the Trusts, it is a final judgment for purposes of *res judicata*. See *Fid. Standard Life Ins. Co. v. First Nat’l Bank & Trust Co.*, 510 F.2d 272, 273 (5th Cir. 1975) (“A case pending appeal is *res judicata* and entitled to full faith and credit unless and until reversed on appeal.”). Finally, as set forth above, the same claims or causes

of action are involved. The Complaint is a blatant collateral attack on the Settlement Order. *See Miller v. Meinhard-Commercial Corp.*, 462 F.2d 358, 360 (5th Cir. 1972) (finding that regardless of relief sought, it is a collateral attack if it must in some fashion overrule a previous judgment).

46. Similarly, the January Order was entered in January 2020 with Mr. Dondero's consent and with the knowledge of Plaintiffs.²⁹ It was never appealed and is final. The July Order was entered in July 2020 without objection and with the knowledge of Plaintiffs. It was (a) never appealed; (b) is final;³⁰ and (c) the Bankruptcy Court was a court of competent jurisdiction.³¹ *See In re Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1052-53 (5th Cir. 1987) (finding a court has jurisdiction for purposes of res judicata when no party contests subject matter jurisdiction in the original proceeding). Consequently, any attempt to add Mr. Seery to the Complaint and subsequent challenges to the Gatekeeper Orders would involve the same issues addressed by the Bankruptcy Court and must be dismissed on the basis of *res judicata*.

E. This Court Should Consider Mr. Dondero's Litigious Nature

47. This Court should also consider the history of this case when determining whether to enforce the reference, including Mr. Dondero's history of vexatious litigation (brought directly and indirectly) and the Bankruptcy Court's familiarity with the Bankruptcy Case and the interrelatedness of Mr. Dondero's byzantine web of related companies. Appx. 5, ¶ 77-78. In fact, the Fifth Circuit recently addressed a similar issue in *Burch v. Freedom Mortgage. Corp.* (*In re*

²⁹ On December 4, 2019, CLOH filed a *Notice of Appearance and Request for Copies* [Docket No. 152] in the Bankruptcy Case by and through its counsel Kane Russell Coleman Logan PC. Since then, CLOH has received notice as required by the Bankruptcy Code of all pleadings filed in the Bankruptcy Case.

³⁰ The Bankruptcy Court specifically found that the Gatekeeper Orders were *res judicata* in the Confirmation Order. *See* Appx. 5, ¶ 73; ¶ 28 *supra*.

³¹ Plaintiffs have questioned whether the Bankruptcy Court exceeded its jurisdiction to enter the July Order in the Motion for Reconsideration. Any attempt to litigate that issue in this Court may impact the Motion for Reconsideration and must be referred to the Bankruptcy Court under the Order of Reference. *See In re Margulies*, 476 B.R. 393 (Bankr. S.D.N.Y. 2012) (citing *Mich. Emp't Sec. Comm'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1143 (6th Cir. 1991)) ("If the action between third parties will have a collateral estoppel effect on the debtor, the third party action is 'related to' the bankruptcy case for jurisdictional purposes.").

Burch). In *Burch*, the movant sought to avoid bankruptcy court jurisdiction over claims regarding the interpretation and enforceability of prior bankruptcy court orders. *Burch*, 385 Fed. Appx. at 747. Mr. Burch, like Mr. Dondero, had also been found to be an abusive litigant. The Fifth Circuit denied Mr. Burch’s attempts to avoid bankruptcy court jurisdiction through clever pleading, calling them “frivolous,” and “warn[ed] Burch that any further frivolous or abusive filings in this court, the district court, or the bankruptcy court will invite the imposition of sanctions, including dismissal, monetary sanctions, and/or restrictions on his ability to file pleadings in this court and any court subject to this court’s jurisdiction.” *Id.*, at 749; *see also* 28 U.S.C. § 1927 (“Any attorney or other person . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”). Mr. Dondero, directly and through his proxies, is a frivolous and abusive litigant – hence the need for the “gatekeeper” provisions. This Court should not provide him a forum to further abuse the judicial process.

CONCLUSION

WHEREFORE, the Debtor respectfully requests that the Court grant its Motion and enter an order in the form annexed to the Motion as **Exhibit A**, and grant any further relief as the Court deems just and proper.

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Dated: May 19, 2021

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EXHIBIT 2

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 19-34054-sgj-11**
HIGHLAND CAPITAL) Chapter 11
MANAGEMENT, L.P.,) Dallas, Texas
Debtor.) Tuesday, June 8, 2021
9:30 a.m. Docket
- SHOW CAUSE HEARING (2255)
- MOTION TO MODIFY ORDER
AUTHORIZING RETENTION OF
JAMES SEERY (2248)
- MOTION FOR ORDER FURTHER
EXTENDING THE PERIOD WITHIN
WHICH DEBTOR MAY REMOVE
ACTIONS (2304)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STACEY G.C. JERNIGAN,
UNITED STATES BANKRUPTCY JUDGE.

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1 DALLAS, TEXAS - JUNE 8, 2021 - 9:30 A.M.

2 THE COURT: All right. We have settings in Highland
3 this morning. We have three settings. We have the show cause
4 hearing with regard to a lawsuit filed in the District Court.
5 We have a couple of more, I would say, ministerial matters,
6 although I think we do have objections. I know we have
7 objections. We have a motion to extend the removal period in
8 this case as well as a motion to modify the order authorizing
9 Mr. Seery's retention.

10 So let's go ahead and start out by getting appearances
11 from the lawyers who are participating today. I'll get those
12 now.

13 MR. MORRIS: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. MORRIS: John Morris from Pachulski, Stang, Ziehl
16 & Jones for the Debtor. I'm joined with me this morning by my
17 colleagues, Jeffrey Pomerantz, Greg Demo, and Zachery Annable.

18 THE COURT: Okay.

19 MR. MORRIS: We do have a proposal on how to proceed
20 today, a substantial portion of which is in agreement with the
21 Respondents.

22 THE COURT: Okay.

23 MR. MORRIS: So, at the appropriate time, I'd be
24 happy to present that to the Court.

25 THE COURT: All right. Well, let's get all the

1 appearances and then I'll hear from you on that.

2 MR. SBAITI: Your Honor, my name is -- would you like
3 me to approach, Your Honor?

4 THE COURT: Yes, please.

5 MR. SBAITI: It's my first time appearing in
6 Bankruptcy Court, Your Honor. My name is Mazin Sbaiti. I'm
7 here on behalf of the charitable DAF Fund, CLO Holdco, and the
8 Respondents to the show cause hearing. We are also
9 representing them as the Movants on the motion to modify the
10 Court's order appointing Mr. Seery.

11 THE COURT: All right. Thank you.

12 MR. BRIDGES: Jonathan Bridges, Your Honor, with Mr.
13 Sbaiti, also representing the Charitable DAF and CLO Holdco,
14 as well as our firm that is named in the show cause order.

15 THE COURT: Okay.

16 MR. BRIDGES: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. PHILLIPS: Good morning, Your Honor. Louis M.
19 Phillips from Kelly Hart Hallman here on behalf of Mark
20 Patrick in the show cause matter. I'm joined with my
21 colleague Michael Anderson from the Kelly Hart firm here in
22 Fort Worth. And that's the matter that we're involved in, the
23 show cause auction.

24 THE COURT: All right. Thank you, Mr. Phillips.

25 MR. TAYLOR: Good morning, Your Honor. Clay Taylor

1 of Bonds Ellis Eppich Schafer Jones here on behalf of Jim
2 Dondero. I have Mr. Will Howell here with me from my firm.

3 THE COURT: All right. Thank you.

4 MR. CLEMENTE: Good morning, Your Honor. Matthew
5 Clemente from Sidley Austin on behalf of the Committee. I'm
6 here with my partner, Paige Montgomery.

7 THE COURT: Okay. Thank you.

8 MR. CLEMENTE: Good morning.

9 THE COURT: All right. Just to remind people, we do
10 have participants on the WebEx, but in setting the hearing I
11 made clear that participants today needed to be here live in
12 the courtroom. So the WebEx participants are going to be only
13 observers.

14 We have a camera on the screen here that is poised to
15 capture both the lawyer podium as well as the witness box, and
16 then another camera on the bench.

17 So, please be mindful. We want the lawyers to speak from
18 the podium so that they are captured and heard by the WebEx.
19 And so hopefully we don't have any cords you will trip over.
20 We've worked hard to make it easy to maneuver around the
21 courtroom.

22 All right. So, Mr. Morris, you had a proposal on how we
23 would approach this today?

24 MR. MORRIS: I do, Your Honor. And it's rather
25 brief, but I think it makes a lot of sense.

1 There are three motions on the calendar for today, --

2 THE COURT: Uh-huh.

3 MR. MORRIS: -- only one of which required the
4 personal appearance of certain parties.

5 THE COURT: Uh-huh.

6 MR. MORRIS: And for that reason, and because,
7 frankly, it was the first of the three motions filed, we
8 believe that that ought to go first.

9 THE COURT: Okay.

10 MR. MORRIS: And then it can be followed by the
11 motion for reconsideration of the July order, assuming time
12 permits, and then the motion to extend the removal deadline.

13 And with respect to the contempt motion, Your Honor, the
14 parties have agreed that each side shall have a maximum of
15 three hours to make opening statements, closing arguments,
16 direct and cross-examination of witnesses.

17 You know, I did point out to them that from time to time
18 Your Honor has used the Court's discretion to adjust the time
19 --

20 THE COURT: Uh-huh.

21 MR. MORRIS: -- if the Court is making inquiries, and
22 I guess we'll deal with that matter as it comes. But as a
23 general matter, that is what we've agreed to. And I would
24 propose that, unless anybody has any objections, that we just
25 proceed on that basis.

1 THE COURT: Okay.

2 MR. MORRIS: And I could -- I could go right forward.

3 THE COURT: So, three hours in the aggregate?

4 MR. MORRIS: Uh-huh.

5 THE COURT: It doesn't matter how people spend it --
6 with argument, examination, cross -- three hours in the
7 aggregate?

8 MR. MORRIS: Correct.

9 THE COURT: Okay. So, Nate, you'll be the timer on
10 that.

11 MR. MORRIS: Yeah. We thought it was very important
12 to get this done today, with people coming in from out of
13 town.

14 THE COURT: Okay. Sounds fine.

15 MR. MORRIS: So does the Court want to inquire if
16 anybody has any questions or comments?

17 THE COURT: I do. Well, I see Mr. Bridges getting
18 up. You confirm that that's agreeable?

19 MR. BRIDGES: Thank you, Your Honor. Yes, that's
20 agreeable. We have one slight difference in our proposal. We
21 would suggest to Your Honor that the motion for modification,
22 if Your Honor decides our way, would moot the entire motion
23 for contempt. And we'd suggest, if that possibility is
24 realistic, that we would go first with that motion, perhaps
25 obviate having to have the evidence presented and the lengthy

1 hearing.

2 The motion for modification, Your Honor, asks the Court to
3 reconsider -- to modify that order because of jurisdictional
4 and other shortcomings in it that make the order
5 unenforceable. And because that's the order that is the
6 subject of the contempt motion, we'd ask Your Honor to
7 consider putting that motion first.

8 THE COURT: Okay. Or second? Ahead of the contempt
9 matter?

10 MR. BRIDGES: Ahead of the contempt matter, --

11 THE COURT: Uh-huh.

12 MR. BRIDGES: -- because it has a possibility --

13 THE COURT: We have the removal matter, which I think
14 is the shortest. All right.

15 MR. BRIDGES: No objection to that, Your Honor.
16 That's correct.

17 THE COURT: Okay. So, Mr. Morris, that's fine by
18 you?

19 MR. MORRIS: Your Honor, that doesn't make a lot of
20 sense to us. We don't believe there's any basis for the Court
21 to reconsider, modify, or amend in any way the July order.
22 But even if we were wrong about that, that would not
23 retroactively validate conduct which was otherwise wrongful at
24 the time it was committed.

25 The contempt motion needs to go first. The other motion

1 will have no impact on whether or not there is a finding of
2 contempt of court.

3 THE COURT: All right. And update me on this. There
4 was something filed yesterday, a notice of a proposed form of
5 order that the Debtor had proposed, that I think was not
6 agreed to, where there would be a change about any action that
7 goes forward, the cause of action would be in the sole
8 jurisdiction of the Court, and you all agreed to change that
9 part of the order, correct?

10 MR. MORRIS: So, just as a division of labor for Your
11 Honor, I'm doing the contempt motion.

12 THE COURT: Okay. That's Mr. Pomerantz's?

13 MR. MORRIS: Mr. Pomerantz is going to take care of
14 that.

15 MR. POMERANTZ: Yes, Your Honor. Good morning. Good
16 to see you again.

17 THE COURT: Good to see you.

18 MR. POMERANTZ: Yes, Your Honor, that's correct. If
19 Your Honor recalls, there's really three aspects of the
20 January 9th and the July 16th order. First, requiring people
21 to come to Bankruptcy Court before commencing or pursuing an
22 action. Second, for the Bankruptcy Court to have the sole and
23 exclusive authority to determine whether the claim is a
24 colorable claim of willful negligence or gross misconduct.
25 And then third, if Your Honor passed the claim through the

1 gate, whether you would have jurisdiction.

2 In Your Honor's January 9th and July 16th orders, you said
3 you would have exclusive jurisdiction. In the motion for
4 reconsideration, and particularly the reply, Movants said, if
5 you just change that and say that if passes through the gate
6 that you'd have jurisdiction only to the extent you would
7 otherwise have it, that would resolve the motion, in the same
8 way that the plan of reorganization was amended.

9 We proposed that. They rejected it. We put it before
10 Your Honor. So we believe that it moots out a good portion --
11 actually, we think it should moot out the entire motion. They
12 obviously disagree. But we definitely agree it moots out the
13 most significant portion of their motion, which is that Your
14 Honor would take jurisdiction to adjudicate a matter on an
15 exclusive basis when you might not otherwise have jurisdiction
16 on an exclusive basis.

17 THE COURT: Okay. Well, --

18 MR. BRIDGES: Your Honor, may I respond to that?

19 THE COURT: You may. And --

20 MR. BRIDGES: Thank you, Your Honor.

21 THE COURT: -- why -- could you clarify why you think
22 it would moot out the entire show cause matter? I wouldn't be
23 retroactively changing my order. Is that what you're
24 proposing?

25 MR. BRIDGES: Your Honor, with all respect, we

1 believe the order is defective and unenforceable and has to be
2 modified in order to fix it. And because of the defects,
3 we're -- we're actually arguing, Your Honor, that it is
4 unenforceable in a contempt proceeding. That is exactly what
5 our argument is.

6 THE COURT: Okay. I think I'm getting way farther
7 down this road than maybe I want to right now. But I guess
8 here's the elephant in the room, I feel like: *Republic Supply*
9 *versus Shoaf*.

10 MR. BRIDGES: Uh-huh.

11 THE COURT: The U.S. Supreme Court *Espinosa* case, for
12 that matter. If I accept your argument that maybe there was a
13 flaw in those orders, that maybe they went too far, don't you
14 have a problem with those two cases?

15 MR. BRIDGES: Your --

16 THE COURT: The orders weren't appealed.

17 MR. BRIDGES: I understand completely, Your Honor.

18 THE COURT: Uh-huh.

19 MR. BRIDGES: And I think the answer is no because of
20 the *Applewood* case from the Fifth Circuit. The *Applewood* case
21 cited in our reply brief explains that in order for an order,
22 a final order of the Bankruptcy Court to have exculpatory
23 effect, in order for it to release claims, for example, that
24 the claims at issue must be enumerated in the order. It's not
25 enough to have a blanket statement like the order, the July

1 order has, like the January order has, saying that Mr. Seery's
2 claims -- claims cannot be brought against him for ordinary
3 negligence at all. The -- Your Honor, we're delving into my
4 argument.

5 THE COURT: Okay.

6 MR. BRIDGES: And I was hoping to do this on a
7 preliminary basis.

8 THE COURT: Right.

9 MR. BRIDGES: I don't mean to bog you down with that.
10 But Your Honor, no, mandatory authority from the Fifth Circuit
11 after *Shoaf* limits *Shoaf's* application and says that it does
12 not extinguish the claims that are not specifically enumerated
13 in the order. And the reason for that is because it doesn't
14 give the kind of notice to the parties that they would need to
15 make an appearance and object to those orders at the time. It
16 actually helps to stem the amount of litigation at the time
17 rather than to encourage it.

18 THE COURT: All right. Well, you'll get your
19 opportunity to make your full argument on this. But I'm not
20 convinced, preliminarily, at least, to affect my decision on
21 the sequence, okay? So even if it potentially wastes time
22 under your view of the law, I am going to do the removal
23 matter first -- the extension of time request, I should say --
24 and then the show cause and then the motion to modify. And I
25 realize, those last two matters, everything is kind of

1 interrelated. All right?

2 MR. BRIDGES: Yes, Your Honor.

3 THE COURT: All right. So, with that decided, is
4 there a desire on the part of the lawyers to make opening
5 statements, or shall we just go to the motions? And, of
6 course, people can use their three hours for oral argument,
7 however much they want to use for oral argument.

8 MR. MORRIS: Your Honor, the -- to be clear, the six-
9 hour time limit only applies to the contempt proceeding.

10 THE COURT: Oh, yes. Yes. Uh-huh.

11 MR. MORRIS: And I do want to make an opening
12 statement.

13 THE COURT: Okay.

14 MR. MORRIS: So, as the Movant, I'd like to go first.

15 THE COURT: You want to make opening statements?

16 MR. BRIDGES: Yes. Yes, Your Honor.

17 THE COURT: Okay. Okay.

18 MR. BRIDGES: I believe we've got a PowerPoint
19 prepared that I think can lay out our side of it.

20 THE COURT: Okay.

21 MR. BRIDGES: I don't think we're participating in
22 the motion to extend the removal time.

23 THE COURT: Okay.

24 MR. BRIDGES: That's going first.

25 THE COURT: All right.

1 MR. BRIDGES: So we'll wait until that is --

2 THE COURT: Well, so we don't get confused on the
3 timing, let's just do the motion to extend right now. And I
4 think we only had one objection. As Mr. Sbaiti just pointed
5 out, they're not objecting on that one. We have a Dondero
6 objection. So let's, without starting the timer, hear that
7 one. Okay?

8 MR. DEMO: Good morning, Your Honor. Greg Demo;
9 Pachulski, Stang, Ziehl & Jones.

10 THE COURT: Good morning.

11 MR. DEMO: I'll be arguing the removal motion and
12 then turn it over.

13 It's fairly basic and straightforward, Your Honor. We're
14 asking for a further extension of the statutory deadline to
15 remove cases until December 14th, 2021. The deadline is
16 procedural only. As Your Honor is well aware, there's a lot
17 of moving parts in this case. You know, we don't know to this
18 date, really, the full universe of what could actually be out
19 there. So we're just asking for a short extension of the
20 removal period to cover through December.

21 I know that there was an objection from Mr. Dondero. I
22 know that he argues that 9006 does not allow us to extend that
23 deadline past the effective date of the plan, and he cites one
24 case for that purpose, which is *Health Support*. I think it's
25 out of Florida. That case dealt with the extension of the

1 two-year extension of the statute of limitations and was very
2 clear that you can't use 9 --

3 THE COURT: You mean the 546 deadline?

4 MR. BRIDGES: Yes. Yes.

5 THE COURT: Okay.

6 MR. BRIDGES: That you can't use 9006 to extend non-
7 bankruptcy deadlines. That's not what we're doing here, Your
8 Honor. We're using 9006 to extend the bankruptcy deadline to
9 remove the cases.

10 THE COURT: Uh-huh.

11 MR. DEMO: And we'd just ask Your Honor for the
12 extension through December.

13 THE COURT: Okay. I'll hear Mr. Dondero's counsel.

14 MR. HOWELL: Good morning, Judge. Will Howell for
15 Mr. Dondero.

16 So, the argument here is not that the Court can't do this.
17 I was just pointing that there is an outside limit to what
18 we're doing. And so if you look at the cases that the Debtor
19 cites in support of this motion, the one that is most apt was
20 when Judge Nelms did a fourth extension of time. But those
21 were all 90-day extensions. Here, we're in a situation where
22 the Debtor is asking for a fourth 180-day extension of time,
23 and this is really where the, you know, objection came -- or,
24 the response in opposition came from. They specifically asked
25 that it be without prejudice to further extensions.

1 And so, at some point, you know, does 9006 have an outside
2 limit? You know, do we need to see some sort of a light at
3 the end of the tunnel here?

4 So we would ask that the motion, at a minimum, be denied
5 in part with respect to this open-ended request for extension
6 beyond two years for a 90-day period. The other cases that
7 they cite, they have one extension here, one extension there,
8 120 days here, but not 180 days after 180 days after 180 days,
9 and then asking specifically for without prejudice to further
10 extensions beyond two years. So that's -- that's where this
11 comes from.

12 THE COURT: All right. Do you think it matters that
13 this is a very complex case?

14 MR. BRIDGES: I --

15 THE COURT: There's litigation here, there, and
16 everywhere.

17 MR. HOWELL: I also think, you know, *Mirant* was
18 complex. I think *Pilgrim's Pride* was complex. I think, you
19 know, it is not out of bounds for the Court to grant a fourth
20 extension.

21 THE COURT: Uh-huh.

22 MR. BRIDGES: But to -- you know, at some point --
23 you know, maybe the Court could grant a 90-day extension and
24 make them come back a little more frequently to kind of corral
25 this thing, rather than just saying "This grant of 180 days,

1 the fourth time, is going to be without prejudice to further
2 extensions." It just gets kind of large.

3 THE COURT: Okay. Mr. Demo, your motion. You get
4 the last word.

5 MR. DEMO: Your Honor, I mean, it is without
6 prejudice for further extensions, but that doesn't mean that
7 Your Honor is granting the further extensions now. It means
8 we'll have to come back. We'll have to make our case for why
9 an extension is necessary. And, you know, if Your Honor
10 doesn't want to give us another extension past December 2021,
11 Your Honor doesn't have to. This is not an order saying that
12 it's a limitless grant.

13 You know, I'd also ask, you know, quite honestly, why Mr.
14 Dondero has such an issue with this. He hasn't said that any
15 of these cases involve him. He hasn't given any reasons why
16 this affects him. He hasn't given any reason why this damages
17 him at all. So I do, I guess, wonder as an initial matter
18 kind of why we're here, you know, why we're responding to Mr.
19 Dondero's request, when that request really has no impact on
20 him.

21 And then, Your Honor, to the extent that you are inclined
22 to limit this, I would say, you know, we would ask for a
23 reasonable extension of time. We do think an extension of
24 time, because of the complexity of this case, through December
25 is warranted. But if Your Honor for some reason does agree

1 that a shorter extension is necessary under 9006 -- I don't
2 think it is -- we'd just ask that Your Honor grant us leave to
3 come back for further extensions of time.

4 THE COURT: Okay. All right. I will -- I'll grant a
5 90-day extension, without prejudice for further extensions.

6 MR. DEMO: Thank you, Your Honor.

7 THE COURT: Maybe in 90 days we'll be farther down
8 the road and we won't need any more extensions, but you'll
9 have the ability to argue for more if you think it's really
10 necessary. All right. So that will bring us to around
11 September 14th, I guess.

12 All right. Well, let's go ahead and hear opening
13 statements with regard to the show cause matter. And again,
14 if you want to roll in arguments about the -- well, no, you
15 said the six hours only applies to show cause, so we'll not
16 hear opening statements with regard to the Seery retention
17 modification, just show cause.

18 MR. MORRIS: All right. Before I begin, Your Honor,
19 I have a small deck to guide --

20 THE COURT: Okay.

21 MR. MORRIS: -- to guide my opening statement.

22 THE COURT: All right.

23 MR. MORRIS: Can I approach the bench?

24 THE COURT: You may. And is your legal assistant
25 going to share her content --

1 MR. MORRIS: Yes.

2 THE COURT: -- so people on the WebEx will see?

3 Okay.

4 MR. MORRIS: That's the intention, Your Honor.

5 THE COURT: Okay.

6 MR. MORRIS: All right. Are you ready for me to
7 proceed?

8 THE COURT: I am. And obviously, everyone has a
9 copy?

10 MR. MORRIS: Yes.

11 THE COURT: Your opponents have a copy of this?

12 MR. MORRIS: Yep.

13 THE COURT: Okay. Although we hope to see it on the
14 screen.

15 OPENING STATEMENT ON BEHALF OF THE DEBTOR

16 MR. MORRIS: Good morning, Your Honor. John Morris;
17 Pachulski, Stang, Ziehl & Jones; for the Debtor.

18 We're here today on the Debtor's motion to hold certain
19 entities and individuals in contempt of court for violating a
20 very clear and specific court order. I hope to be relatively
21 brief in my opening here, Your Honor, and I'd like to begin
22 where I think we must, and that is, how do we -- how do we
23 prove this and what do we have to prove?

24 The elements of a claim for contempt of court are really
25 rather straightforward. The Movant must establish by clear

1 and convincing evidence three things.

2 THE COURT: Let me stop you and stop the clock.

3 We're not seeing the shared content.

4 MR. MORRIS: Uh-huh.

5 THE COURT: Did you want her to go ahead and share
6 her content?

7 MR. MORRIS: I did.

8 THE COURT: Okay.

9 MR. MORRIS: I was hoping that she'd do that.

10 THE COURT: All right. It says it's receiving
11 content.

12 MR. MORRIS: There we go. It's on my screen, anyway.

13 THE COURT: Oh, here it is. I don't know why it's
14 not on my Polycom. Can you all see it out there?

15 (Chorus of affirmative replies.)

16 THE COURT: Okay. Very good.

17 MR. MORRIS: Okay.

18 THE COURT: You may proceed.

19 MR. MORRIS: Thank you, Your Honor.

20 So, there's three elements to the cause of action for
21 contempt, for civil contempt. We have to prove by clear and
22 convincing evidence that a court order was in effect; that the
23 order required certain conduct by the Respondents; and that
24 the Respondent failed to comply with the Court's order.

25 We've cited in the footnote the applicable case law from

1 the Fifth Circuit, and I don't believe that there's any
2 dispute that is indeed the legal standard.

3 The intent of the Respondents as to liability is
4 completely irrelevant. It doesn't matter if they thought they
5 were doing the right thing. It doesn't matter if they
6 believed in their heart of hearts that the court order was
7 invalid. These are the three elements, and we will be able to
8 establish these elements not by clear and convincing evidence,
9 but if we ever had to, beyond reasonable doubt.

10 If we can go to the next slide, please.

11 We begin with the Court's order, the Court's July 9 order.
12 And that order states very clearly what conduct was required.
13 And the conduct that was required was that no entity could
14 commence or pursue -- those are really the magic words --
15 commence or pursue a claim against Mr. Seery without the
16 Bankruptcy Court doing certain things. And we've referred to
17 this as the gatekeeper. And the only question I believe the
18 Court has to ask today is whether the Respondents commenced or
19 pursued a claim against Mr. Seery without seeking Bankruptcy
20 Court approval, as set forth in this order.

21 I'll dispute that there's anything ambiguous about this.
22 I'll dispute that it could not be clearer what conduct was
23 prohibited. It could not be clearer. The only question is
24 whether the conduct constitutes the pursuit of a claim.

25 Let's see what they did. If we could go to the next

1 slide. There will be no dispute about what they did. And
2 what they did is, a week after filing a lawsuit against the
3 Debtor and two others arising out of the HarbourVest
4 settlement, a settlement that this Court approved, after
5 notice and a hearing and participation by the Respondents,
6 after they had the opportunity to take discovery, after they
7 had the opportunity to examine Mr. Seery about the value of
8 HarbourVest's interest in HCLOF, after all of that, they
9 brought a lawsuit after Mr. Patrick took control of the DAF
10 and CLO Holdco. And that lawsuit related to nothing but the
11 HarbourVest suit, and it named in Paragraph 2, right up above,
12 Mr. Seery as a potential party. And a week later, Your Honor,
13 they filed what we call the Seery Motion, and it was a motion
14 for leave to amend their complaint to add Mr. Seery as a
15 defendant.

16 We believe that that clearly violates the Court's July 7
17 order. And indeed, again, these are facts. They're not --
18 they're not in dispute. Just look at the first sentence of
19 their motion. The purpose of the motion was to name James
20 Seery as a defendant. That was the purpose of the motion.
21 And the way that they made the motion, Your Honor -- and these
22 are undisputed facts -- the way they made the motion, Your
23 Honor, shows contemptuous intent. We don't have to prove
24 intent, but I think it might be relevant when you get to
25 remedies. Okay?

1 And so how do I -- why do I say that? Because they made
2 this motion, Your Honor, and they didn't have to. Everybody
3 knows that under Rule 15 they could have amended the complaint
4 if they wanted to. If they wanted to, they didn't need the
5 Court's permission. What they wanted to do was try to get the
6 District Court to do what they knew they couldn't. And that's
7 contemptuous.

8 And they did it, Your Honor, without notice to the Debtor.
9 Even after the Debtor had accepted service of the complaint,
10 even after we told them, if you go down this path, we're going
11 to file a motion for contempt, they did it anyway. They
12 didn't serve the Debtor. They didn't give the Debtor a
13 courtesy copy. They didn't notify the Debtor. The only thing
14 that happened was the next day, when the District Court
15 dismissed it without prejudice, they sent us a copy of that
16 notice. And within three days, we were here.

17 A court order was in effect. Mr. Patrick is going to
18 admit to that. There's not going to be any dispute about
19 that. The order required that the Respondents come to this
20 Court before they pursue a claim against Mr. Seery, and they
21 failed to comply with that order. The facts, again -- if we
22 can go to the next slide. We can look at some of the detail,
23 because the timeline is mindboggling.

24 Mr. Patrick became the Plaintiffs' authorized
25 representative on March 24th. And folks, when I took their

1 depositions, weren't specific about dates, and that's why some
2 of the entries here refer to sometime after, but there's no
3 question that the order of events is as presented here and as
4 the evidence will show today.

5 The evidence will show that sometime after Patrick became
6 the Plaintiffs' authorized representative, Mr. Dondero
7 informed Mr. Patrick that Highland had usurped an investment
8 opportunity from the Plaintiffs. Mr. Patrick is going to
9 testify to that. Mr. Patrick is also going to testify that,
10 without prompting, without making a request, D.C. Sauter, the
11 general counsel of NexPoint Advisors, recommended the Sbaiti
12 firm to Mr. Patrick. Mr. Patrick considered nobody else.

13 Mr. Patrick retained the Sbaiti firm in April. In other
14 words, within 12 days of the filing of the complaint. They're
15 retained and they conduct an investigation. You're going to
16 hear the assertion of the attorney-client and the common
17 interest privilege every time I ask Mr. Dondero what he and
18 Mr. Sbaiti talked about and whether they talked about naming
19 Jim Seery as a defendant. But with Patrick's authorization,
20 the Sbaiti firm filed the complaint on April 12th, just days
21 after they were retained.

22 It's like a -- it's an enormous complaint. I don't know
23 how they did that so quickly. But in any event, the important
24 point is that they all worked together. None of this happened
25 until Mr. Patrick became the authorized representative.

1 Mr. Patrick is going to tell you, Your Honor, he's going
2 to tell you that he had no knowledge of any wrongdoing by Mr.
3 Seery prior to the time he assumed the rein of the DAF and the
4 CLO Holdco. He had no knowledge, Your Honor, of any claims
5 that the DAF and CLO Holdco had against the Debtor until he
6 became the Plaintiffs' authorized representative and Mr.
7 Dondero spoke to him.

8 If we can flip to the next page. Mr. Dondero has
9 effective control of the DAF. He has effective control of CLO
10 Holdco. You're going to be bombarded with corporate documents
11 today, because they're going to show you -- and they want you
12 to respect the corporate form, they really want you to follow
13 the rules and respect the corporate form, because only Mr.
14 Scott was responsible for the DAF and CLO Holdco until he
15 handed the reins on March 24th to Mr. Patrick. Mr. Dondero
16 has nothing to do with this. He's going to tell you. He's
17 going to tell you he had nothing to do with the selection of
18 Mr. Patrick as Mr. Scott's replacement.

19 The facts are going to show otherwise, Your Honor. The
20 DAF is a \$200 million charitable organization that is funded
21 almost exclusively with assets derived from Highland or Mr.
22 Dondero or the Get Good Trust or the Dugaboy Trust. The
23 evidence is going to show that at all times these entities had
24 shared services agreements and investment advisory agreements
25 with HCMLP. The evidence will show that HCMLP at all times

1 was controlled by Mr. Dondero.

2 And it made sense. The guy put in an awful lot of money
3 for charitable usage. Is he really just going to say, I don't
4 really care who runs it? The evidence is going to show that
5 between October 2020 and January 2021, Grant Scott actually
6 exercised independence. Grant Scott was Mr. Dondero's
7 childhood friend. They went to UVA together. They were
8 roommates. Mr. Scott was the best man at Mr. Dondero's
9 wedding. But we were now in bankruptcy court. We're now in
10 the fishbowl. And I will -- this may be a little argument,
11 but there's no disputing the facts that Mr. Scott acted
12 independently, and he paid the price for it. Mr. Scott did it
13 three times.

14 He did it when he amended CLO Holdco's proof of claim to
15 take it down to zero. He did it again after he withdrew the
16 objection to the HarbourVest settlement motion. And he did it
17 again when he settled the lawsuit that the Debtors had brought
18 against CLO Holdco. And that -- and on each of those three
19 occasions, the evidence will show that Mr. Scott did not
20 communicate with Mr. Dondero in advance, that Mr. Dondero
21 found out about these acts of independence after the fact, and
22 that each time he found out about it he had a little
23 conversation with Mr. Scott.

24 Mr. Dondero is going to tell you about it, and he's going
25 to tell you that he told Mr. Scott each act was inappropriate.

1 You may have heard that word before. Each act was not in the
2 best interests of the DAF.

3 The last of those conversations happened either on or just
4 after January 26th. And by January 31st, Mr. Scott gave
5 notice of his resignation. And you're going to see that
6 notice of resignation. And he asks for releases.

7 Mr. Patrick becomes, almost two months later, the
8 successor to Mr. Scott. Mr. Dondero is going to say he has no
9 idea how that happened. He was just told after the fact that
10 Mr. Patrick and Mr. Scott had an agreement. He's going to
11 tell you they had an agreement and he just heard about it
12 afterwards. He didn't really -- for two months, I guess, he
13 sat there after Mr. Scott told him that he wanted out and did
14 nothing to try to find out who's going to take control of my
15 charitable foundation with \$200 million. He wasn't
16 interested.

17 But here's the thing, Your Honor. If we go to the next
18 slide. Let's see what Mr. Scott said at his deposition last
19 week. Question, "Do you know who selected Mark?" Answer, "I
20 do not." Question, "Do you know how Mark was selected?" Mark
21 is a reference to Mark Patrick. "I do not." "Did you ever
22 ask Mark how he was selected?" "I did not." "Did you ever
23 ask Mark who selected him?" "I did not." "Did you ever ask
24 anybody at any time how Mr. Patrick was selected to succeed
25 you?" "No, I did not." "Did you ever ask anybody at any time

1 as to who made the decision to select Mr. Patrick to succeed
2 you?" "No, I did not."

3 So I don't know what happened between Mr. Patrick and Mr.
4 Dondero when Mr. Patrick supposedly told Mr. Dondero that
5 there was an agreement with Mr. Scott, but that is news to Mr.
6 Scott. He had no idea.

7 Your Honor, we are going to prove by clear and convincing
8 evidence that each of the Respondents violated a very clear
9 and specific court order. And unless the Court has any other
10 questions, I'll stop for now.

11 THE COURT: No questions.

12 MR. MORRIS: Thank you, Your Honor.

13 THE COURT: All right. Who is making the argument
14 for the Respondents?

15 MR. SBAITI: Your Honor, I am. I'm just trying to
16 put the PowerPoint up on the WebEx.

17 THE COURT: Okay.

18 MR. SBAITI: Sorry about that.

19 MR. MORRIS: Your Honor, I'll try not to make this a
20 practice, but can I inquire as to how much time I used?

21 THE COURT: Oh. Nate?

22 THE CLERK: About thirteen minutes.

23 THE COURT: Thirteen minutes?

24 MR. MORRIS: Thank you very much.

25 THE COURT: Okay. All right.

1 MR. SBAITI: Your Honor, our PowerPoint is a little
2 bit longer than that one. May I approach with a copy?

3 THE COURT: You may. Uh-huh.

4 (Pause.)

5 MR. SBAITI: Your Honor, it does feel good to be back
6 in the courtroom.

7 THE COURT: Okay.

8 MR. SBAITI: It's been a long time.

9 THE COURT: Yes. For us, too.

10 MR. SBAITI: Just wish it wasn't under a circumstance
11 where someone is trying to sanction me.

12 But we're going to be dividing up this oral argument a
13 little bit. Also, to just kind of break up a little bit of
14 the monotony, because I think we have a lot to cover at the
15 opening stage of this. And I'll try to be as expeditious as I
16 can be.

17 OPENING STATEMENT ON BEHALF OF THE SHOW CAUSE RESPONDENTS

18 MR. SBAITI: Your Honor, the thing we -- the thing we
19 open with is the due process issue that we raised in our
20 brief. And where this really arises from is the Court's show
21 cause order calls us violators before we've had a chance to
22 respond to the allegations and before we've obviously been
23 able to approach this hearing. And the word violators means
24 something to us, Your Honor, because I've been a lawyer for a
25 long time, my partner has been a lawyer for a long time, our

1 clients have never been sanctioned, we've never been
2 sanctioned, and for us to be labeled violators first by
3 counsel and then in a court order makes us wonder whether or
4 not this process is already prejudged or predetermined.

5 THE COURT: I actually want to address that. Turn
6 off the clock.

7 Just so you know, I looked this up a while back, because
8 we gave a bankruptcy judges panel at some CLE. The average
9 bankruptcy judge in our district, back when I looked, signs
10 over 200 orders a week.

11 MR. SBAITI: Sure.

12 THE COURT: Many of those -- in fact, most of them --
13 are submitted by lawyers. So, you know, a big chunk of my
14 week is signing orders. And I obviously give more scrutiny to
15 those that are substantive in nature. Okay? If someone
16 submits to me a 50-page debtor-in-possession financing order,
17 I will look at that much more carefully than what I consider a
18 mere procedural order setting a hearing.

19 So I regret that that word was used, but I can assure you
20 I fairly quickly set that -- signed that, I should say --
21 regarding it as a merely procedural order setting a hearing.
22 Okay? So it's as simple as that. There was no hmm, I like
23 that word, violator. I had a stack, if you will, an
24 electronic stack of probably 200 orders in front of me the day
25 I signed that. Okay?

1 So, if that makes anyone feel any better, I don't know,
2 but that's the reality.

3 Okay. You can start the clock again.

4 MR. SBAITI: And I appreciate Your Honor saying that.
5 It does make us feel better, both about where the -- the
6 genesis of the order and the impact and its reflection on what
7 Your Honor thinks in terms of going into this.

8 The other thing that obviously raised concerns, and I
9 assume this comes from the same place, was four days ahead of
10 that order counsel told us the Court was going to order
11 everyone to be in person, and they had advance notice of that,
12 and we weren't sure how they had advance notice of that. I
13 guess they assumed --

14 THE COURT: I can assure you right here on the record
15 I never had ex parte communications with any lawyer in this
16 case, on this matter or any other matter. Okay? Again, those
17 are pretty strong words to venture out there with, which your
18 pleading did venture out there with those words.

19 My courtroom deputy, Traci, I think answers her phone 24
20 hours a day. So I'm quite sure she had communications with
21 the lawyers about this, just like she probably had
22 communications with you and your firm and every other firm in
23 this case. Okay?

24 MR. SBAITI: Like I said, Your Honor, we appreciated
25 what Your Honor -- appreciate what Your Honor said, but that

1 issue obviously stuck out -- stuck out to us, in combination.
2 So I'll move on from that issue.

3 This has to do with the lawsuit that was filed, and the
4 lawsuit, the genesis of the lawsuit, I think it's important to
5 say, because the argument has been raised in the briefing and
6 we wanted to address it upfront, why the lawsuit comes about.
7 And it comes about because of the Advisers Act and the
8 responsibilities that the Debtor has to the assets of the
9 funds that it manages. And the Advisers Act imposes a duty
10 not only on Highland but obviously on its control people and
11 its supervised people. And the lawsuit has to do with HCLOF,
12 which is what HarbourVest owned a piece of. And Highland, as
13 the advisor to HCLOF and the advisor to the DAF, owed
14 fiduciary duties to CLO Holdco, which is the DAF's holding
15 entity of its assets in HCLOF, but Highland Capital was also
16 an advisor, a registered investment advisor to the DAF
17 directly at the time. And so those federally-imposed
18 fiduciary duties lie at the crux of that lawsuit.

19 Moving on, Mr. Seery testified at the hearing that was in
20 this Court to be -- to get him appointed, and this was Exhibit
21 2 that was presented by the Debtor, and on Page 16 at the
22 bottom he says -- of the transcript, he says, I think, from a
23 high level, the best way to think about the Debtor is that
24 it's a registered investment advisor. As a registered
25 investment advisor, which is really any advisor of third-party

1 money over \$25 million, it has to register with the SEC, and
2 it manages funds in many different ways.

3 In the middle of the next page he says, In addition, the
4 Debtor manages about \$2 billion, \$2 billion in total managed
5 assets, around \$2 billion in CLO assets, and then other
6 securities, which are hedge funds -- other entities, rather,
7 which are hedge funds or PE style. Private equity style.

8 On Page 23 towards the bottom he says, As I said, the
9 Investment Advisers Act puts a fiduciary duty on Highland
10 Capital to discharge its duty to the investors. So while we
11 have duties to the estate, we also have duties, as I mentioned
12 in my last testimony, to each of the investors in the funds.
13 CLO Holdco would be an investor in one of those funds, HCLOF.

14 He goes on to say, Some of them are related parties, and
15 those are a little bit easier. Some of them are owned by
16 Highland. HCLOF was not owned by Highland. But there are
17 third-party investors in these funds who have no relation
18 whatsoever to Highland, and we owe them a fiduciary duty both
19 to manage their assets prudently but also to seek to maximize
20 value.

21 Now, the lawsuit alleges that Seery testified that the
22 HarbourVest portion of Highland CLO Funding was worth \$22-1/2
23 million. Now, Mr. Morris wants the Court to hinge on the fact
24 that, well, no one asked him whether he was lying. But that's
25 not really the standard, and it certainly isn't the standard

1 when someone's an investment advisor and owes fiduciary
2 duties, which include fiduciary duties to be transparent with
3 your investors.

4 It also includes fiduciary duties not to self-deal.

5 The lawsuit also alleges that, in reality, those assets
6 were worth double that -- double that amount at the time. We
7 found out just, you know, in late March/early April that a
8 third -- from a third party who had access to the underlying
9 valuations at the time that those values were actually double
10 and that there was a misrepresentation, giving rise to the
11 lawsuit. That change in circumstance is the key issue behind
12 the lawsuit.

13 We allege that Mr. Seery and the Debtor, as RIAs, had a
14 duty to not self-deal and be fully transparent with that
15 information, and we think both of those things were violated
16 under the Advisers Act.

17 We don't allege that the HarbourVest settlement should be
18 undone or unwound. We can't unscramble that egg. We do seek
19 damages, as I believe is our right, arising out of the
20 wrongdoing and the process of pushing forth the settlement.

21 I think one of the allegations in the actual motion for
22 the show cause order was that this was going to undo all of
23 the hard work that Court had done and basically unwind and try
24 to re-piece Humpty Dumpty back together again. But that's
25 simply not the case. Nowhere in our allegations or in the

1 relief that we request are we trying to undo the HarbourVest
2 settlement as such.

3 Now, whether the lawsuit should be dismissed under the
4 affirmative defenses that they bring up -- res judicata,
5 waiver, release -- all of those are questionable under the
6 Advisers Act, given the change of circumstance, and therefore
7 are also questions on the merits. They don't go to the
8 colorability of the underlying claims in and of themselves,
9 which I think is important.

10 So we asked for leave to amend from the Court. And what
11 they want us to do, Your Honor, is they want to sanction us
12 for asking. They're saying asking for leave to amend is the
13 same thing as pursuing a claim. And I'll get to the specifics
14 on that in a little bit. But that's the frame. Can we be
15 sanctioned for asking a court, any court, even if it's the
16 wrong court, for permission to bring the lawsuit? They don't
17 cite a single case that says that that, in and of itself, is
18 sanctionable conduct, us asking.

19 So I'd like to introduce some of the Respondents.

20 Your Honor, may I have one of these waters?

21 THE COURT: Certainly.

22 MR. SBAITI: Thank you.

23 THE COURT: That's why they're there, by the way.

24 MR. SBAITI: I didn't know if they belonged to
25 somebody else.

1 THE COURT: We've scattered water bottles around for
2 people.

3 MR. SBAITI: I appreciate it. Thank you, Your Honor.

4 THE COURT: So if you see these little ones, that's
5 for anyone.

6 MR. SBAITI: So, this is an org chart, and you'll see
7 it as -- the exhibits that the Debtor's going to bring up.
8 And when we talk about the DAF, Your Honor -- I don't know if
9 that's visible to you. We're on Slide 19, if you're looking
10 at it on paper. There's a little number at the lower right-
11 hand corner. The charitable DAF GP, LLP and then the
12 Charitable DAF Holdco, Ltd. together are the principles of the
13 Charitable DAF Fund, LP. And so when we refer to the DAF or
14 the Charitable DAF, that's really the entity structure that
15 we're referring to. And then the GP and Holdco Ltd. have a
16 managing member. It used to be Grant Scott at the time this
17 was done. Today, it's Mr. Mark Patrick, who's in the room,
18 sitting next to Mr. Bridges.

19 The DAF is a charitable fund. It's funded over \$32
20 million, as the evidence will show, including Dallas-Fort
21 Worth organizations, The Family Place, Dallas Children's
22 Advocacy, Center for Brain Health, the Crystal Ray Initiative,
23 Friends of the Dallas Police, Snowball Express, various
24 community and education initiatives, Dallas Arts, museums, the
25 Perot Museum, Dallas Zoo. That evidence is undisputed, Your

1 Honor. The DAF is a real fund. It is a real charitable fund.
2 It does real good in the community.

3 Now, Respondents -- Holdco, which you will see at the
4 bottom of that chart, is essentially the investment arm.
5 There are assets that the DAF owns in various pots, and Holdco
6 is the actual business engine that generates the money from
7 those assets that then -- that then gets passed up to the
8 charitable -- the four charitable foundations at the top.

9 I'll go back to Slide 21. And if you look at the top,
10 Your Honor, the Dallas Foundation, Greater Kansas City
11 Community, Santa Barbara Foundation, The Community Foundation
12 of North Texas: Those are the charities that then themselves
13 bestow the funds onto the actual recipients. So the money
14 flows up as dividends or distributions, and then gets
15 contributed.

16 CLO Holdco invests those assets, and it's an important
17 part of the business model, so that you're not sending out
18 principal. It's the money that CLO makes, the profits, if you
19 will, that it is able to generate that gets donated and makes
20 its way into the community.

21 So there's an important feature to the structure in that
22 it has to be able to generate money. It's not just money that
23 sits there and waits to be distributed. There's active
24 investing going on.

25 Mr. Mark Patrick owns the control shares of the entities

1 comprising the DAF and CLO Holdco, as I showed you, and the
2 beneficiary charitable foundations hold what we call
3 beneficial interests, where they just get money. They don't
4 have a vote.

5 Mr. Patrick cares about the public service the DAF engages
6 in. He's been an advisor to the DAF, CLO Holdco, and its
7 predecessor, Mr. Scott, since its inception. He receives no
8 compensation for the job he's doing today. And you'll hear
9 how he became -- how he inured to the control position of the
10 DAF and CLO Holdco from him, but it doesn't involve Mr.
11 Dondero, and the absence of someone saying that it did, I
12 think, is going to be striking by the end of the presentation
13 of evidence.

14 Their only argument against you, Your Honor, is going to
15 be you just can't believe them. But not believing witnesses
16 is not a substitute for the lack of affirmative evidence.

17 Mr. Patrick has said all along he authorized the filing of
18 the motion for leave to add Mr. Seery to the lawsuit in
19 District Court. He doesn't believe the motion to amend
20 violated this Court's orders, for the reasons stated in our
21 responsive filings to the motions for contempt and show cause
22 order. That's why he authorized it.

23 My firm, Sbaiti & Company, we're a small Dallas litigation
24 boutique retained by the DAF and CLO Holdco to file the
25 lawsuit. We did an investigation. I'm tickled to death that

1 Mr. Morris loved our complaint so much and gave us the
2 compliment that we got it done in a short amount of time, but
3 we did get it done in a short amount of time, because, in the
4 end, it's a rather simple issue, as I was able to lay it out
5 in about three or four bullet points in a previous slide.

6 The written aspect of that doesn't take that long, as Your
7 Honor knows, but the idea that there's a suspicion that we
8 didn't write it or someone else wrote it and ghost-wrote it
9 and gave it to us, which I think is the insinuation he was
10 making, is completely unfounded. There's no evidence of that.

11 We carefully read Your Honor's orders. We developed a
12 good-faith basis, as required by Rule 11, that the lawsuit and
13 the motion to add Mr. Seery were not filed in bad faith or for
14 an improper purpose. We don't think they're frivolous. We
15 don't think they're in violation of Your Honor's orders, given
16 the current state of the law.

17 Mr. Dondero is one of the settlors of the CRT, of the
18 Charitable Remainder Trust that ultimately provided assets to
19 CLO Holdco and the DAF. He does care about the DAF's mission.
20 I think Mr. Morris hit the nail on the head. Of course Mr.
21 Dondero cares about what happens to it. He's one of the
22 settlors, and it was his funds that initially were put into
23 it, so he's allowed to care. And I don't think him caring is
24 insidious, and him caring doesn't mean he has control and
25 doesn't mean he's the driving force behind some insidious

1 conspiracy that they're trying to insinuate exists.

2 He is an advisor to the DAF and CLO Holdco. It is a lot
3 of money and it needs advice, and he's an advisor to Mr.
4 Patrick. We don't run away from any of those facts, Your
5 Honor.

6 We also don't run away from the fact that he was the
7 source of some of the information that came in to that
8 complaint and that he relayed some of that information. The
9 content, we do claim work product privilege and attorney-
10 client privilege, because he's an agent of our client, and as
11 lawyers doing an investigation, the content of our
12 communications is protected under the attorney-client and work
13 product privileges, as well as the joint interest privilege.
14 But the fact that we admit that those communications happened,
15 we're not running away from that fact.

16 So, what does he have to do with this? It's interesting
17 that that opening argument you just heard spent about three
18 minutes on contempt and the other fourteen or fifteen minutes
19 or so on Mr. Dondero. And only on Mr. Dondero. There's a
20 negative halo effect, I believe, that they're trying to get
21 this Court to abide by. They want to inflame Your Honor and
22 hopefully capture -- cultivate and then capitalize on whatever
23 antipathy you might have for Mr. Dondero, and then sweep us
24 all in under that umbrella and sanction everybody just because
25 he had some involvement.

1 But whatever involvement he has, which we admit he had
2 some involvement in helping us marshal the facts, that's not a
3 basis for us to be sanctioned if there isn't an actual
4 sanctionable conduct that -- as we say there isn't.

5 We think there's an ulterior motive. That's why Mr.
6 Morris just announced to Your Honor, Mr. Dondero controls it
7 all. The ulterior motive, I believe, is, down the line, when
8 they want to argue some kind of alter ego theory, they want to
9 lay that foundation here. I don't think this is the
10 appropriate time for that foundation, and I don't think any of
11 the information and the evidence they're trying to marshal in
12 front of you is really going to be relevant to the very
13 specific question that's before Your Honor: Does our motion
14 asking the District Court to add Mr. Seery violate your order,
15 or violate it in a way that can be -- that we can be
16 sanctioned for? We don't believe it violates it.

17 So, the three core standards that have to be met. First
18 of all, civil contempt requires a valid, enforceable order.
19 It's not debatable and it's not -- I don't think that's a
20 shocking statement. Then they have to have clear and
21 convincing evidence of a violation of a specific unambiguous
22 term therein. Mr. Morris wants his version of the word pursue
23 to be unambiguous, and I think the word pursue is unambiguous.
24 But the way he wants you to construe it makes it completely
25 ambiguous, and we'll -- I'll get to that in a moment.

1 Now, for sanctioning counsel, the Fifth Circuit has held
2 you have to find bad faith. We're adjudged under a slightly
3 separate standard under the Fifth Circuit law. So the
4 contempt motion, though, to the extent it seeks to impose
5 double and treble attorney's fees, those are in punitive
6 fines. They are not compensatory. So criminal contempt
7 standards are raised, and so they have to show a violation in
8 bad faith. In other words, our arguments that we're making
9 have to be bad faith, not simply that we're wrong, and they
10 have to show beyond a reasonable doubt, usually in front of a
11 jury. The U.S. Supreme Court explained the difference and the
12 different procedural protections that have to be involved if
13 they're really going to seek double and treble compensatory
14 damages.

15 Now, he's right. Saying we intended -- saying that we
16 didn't mean to violate it isn't necessarily a defense. But
17 what you're actually going to hear from him is the opposite
18 argument, that even though we didn't violate it, we wanted to.
19 That's what he says. That's why he quoted you the opening
20 section of our motion asking for permission to sue Mr. Seery,
21 because that's a statement of purpose. And he says you should
22 sanction them right there. That's literally what he said.
23 It's right there, their purpose. If intent is irrelevant to
24 them, it's irrelevant as to us. The fact that we wanted to
25 sue Seery is fully admitted. We don't deny the fact that we

1 believe Mr. Seery should be a defendant in this lawsuit. But
2 the fact that we didn't sue him is why we didn't violate the
3 order. And they can't say that the fact that we eventually
4 wanted to sue him means we did violate the order. That door
5 swings both ways, Your Honor.

6 We don't think any element is met. The order, while writ
7 large, prohibits suing Mr. Seery without permission, and we
8 did not sue James Seery, pure and simple. The July 12 --
9 14th, 2020 order purports to reserve exclusively to this Court
10 that which, according to the statutes and the case law, we
11 believe the Court can't exclusively reserve to itself. And
12 Your Honor, the order prohibits commencing and pursuing a
13 claim against Jim Seery without coming here first to decide
14 the colorability of such a claim.

15 They, I believe, admit that we didn't commence a claim
16 against Jim Seery. I think they've admitted that now. So now
17 we're talking about what does pursue mean? We didn't pursue a
18 claim against Jim Seery. Is asking for leave to bring suit
19 the same thing as pursuing a claim? That's the question
20 that's really before Your Honor. Lawyers never talk of
21 pursuing a claim that hasn't been filed. We don't say, I'm
22 pursuing a claim and I'm going to file it next week or next
23 year. Usually, that type of language is in an order, because
24 when the order happens, there may already be claims against
25 Mr. Seery. And so the pursuit of claim is supposed to attack

1 those cases, to come here and show colorability, presumably,
2 before they continue on with those lawsuits. It doesn't mean
3 asking for permission.

4 If it did mean asking for permission, then complying with
5 Your Honor's order would be a violation. If the motion for
6 leave is a violation because it is pursuing a claim, if I had
7 filed that motion in this Court, it would still be pursuing a
8 claim without Your Honor's permission. I'd have to get
9 permission just to ask for permission. It puts us in this
10 endless loop of, well, if asking for permission is pursuing a
11 claim, and pursuing a claim is without permission violates the
12 Court's order, we'd always be in violation of the Court's
13 order just for asking, just for following Your Honor's edict.

14 THE COURT: I'm just, I'm going to interject. You
15 were supposed to, under the order, file a motion in this
16 Court.

17 MR. SBAITI: I understand that, Your Honor, and I
18 think that we can get to the specifics on why we disagree with
19 how the motion went, Your Honor. We hadn't sued Mr. Seery.
20 So as long as we dealt with the order, which is what our
21 position is, then we don't believe we violated the order.

22 THE COURT: You think the order was ambiguous,
23 requiring a motion to be filed in the Bankruptcy Court?

24 MR. SBAITI: Your Honor, what we believe is that the
25 order was ambiguous in terms of whether us asking for

1 permission in the District Court was in and of itself a
2 violation of the order. We don't think it was. Actually, we
3 don't think the order's ambiguous to that extent. The second
4 we file a suit against Mr. Seery and we don't have some
5 resolution of the issue, then I think the question of
6 sanctionability comes in. But we never filed suit, Your
7 Honor.

8 The Court doesn't say I can't seek permission in the
9 District Court or that we can't go to the District Court with
10 -- which has general jurisdiction over this case, and has
11 jurisdiction, we believe, over the actual case and controversy
12 that's being raised. But the idea of pursuit being a
13 violation of the order, of the letter of that order, is
14 nonsensical under that, it leads to an absurd result, and it's
15 plainly vague and ambiguous, Your Honor.

16 Asking Judge Boyle or asking a District Court for
17 permission is not a violation of this Court's order, not the
18 way it was written and not -- and I don't even believe it was
19 a violation necessarily of the Court's -- of the language that
20 the Court has. We -- it doesn't unambiguously prevent us from
21 asking the District Court for leave.

22 The Court's order yesterday, Your Honor, applied this very
23 rule. The TRO -- you said the TRO did not specifically state,
24 Turn your cell phone over. And you denied motion for
25 sanctions on that. That's basically the argument we're making

1 here, Your Honor. We think that was the correct ruling, and
2 we think the same type of ruling applies here.

3 Your order yesterday also determined that the Court
4 ultimately believes that hiring lawyers to file motions should
5 not be viewed as having crossed the line into contemptuous
6 behavior. That's essentially the argument they want you to
7 buy, that there's somehow a vindictiveness behind this and an
8 insidious plan to violate court orders, Your Honor. We don't
9 have any evidence of that.

10 THE COURT: Okay. Take the words vindictiveness and
11 insidious out of the equation. That's making things personal,
12 and I don't like that. The key is the literal wording of the
13 order, is it not?

14 MR. SBAITI: Your Honor, the key, I believe, is the
15 --

16 THE COURT: No entity may commence or pursue a cause
17 of action of any kind against Mr. Seery relating in any way to
18 his role as the chief executive officer and chief
19 restructuring officer of the Debtor without the Bankruptcy
20 Court first determining, after notice, that such claim or
21 cause of action represents a colorable claim of willful
22 misconduct or gross negligence against Mr. Seery and
23 specifically authorizing such entity to bring such a claim.
24 So I'm trying to understand why you argue that filing a motion
25 asking the District Court for permission is not inconsistent

1 with this order.

2 MR. SBAITI: Because it's not commencing a claim,
3 Your Honor. It's not commencing a claim against him.

4 THE COURT: Okay. So is your argument that if Judge
5 Boyle authorizes amendment of the pleading to add Mr. Seery
6 and then you do it, at that point they may have grounds for a
7 motion for contempt, but not yet, because she has not actually
8 granted your motion?

9 MR. SBAITI: Correct, Your Honor. I mean, in a
10 nutshell. In fact, that's one of -- I think that's probably
11 our next argument. We think, in a sense, this argument is
12 incredibly premature. There is three ways that this -- well,
13 I'd like to address this, so I've got -- I've got a diagram
14 that I think will actually help elucidate what our thought
15 process was.

16 There's three things she could have done. She could have
17 referred -- referred it to Your Honor, which is what we
18 expected was likely to happen.

19 THE COURT: But you didn't file a motion for referral
20 of the motion before her.

21 MR. SBAITI: Well, no, I don't mean in respect of
22 enforcing the reference. The referral we thought was most
23 likely going to happen because it's an associated case, and we
24 actually put those orders in front of her, so we expected that
25 those orders would end up -- that the question would

1 ultimately end up in front of Your Honor on that basis.

2 She could have denied our motion outright, in which case
3 we haven't filed a claim, we haven't violated it, or she could
4 have granted our motion and done one of two things. She could
5 have granted it to the extent that she thought leave would be
6 proper but then referred it down, or she could have decided --
7 taken the decision as the court with general jurisdiction and
8 simply decided it all on her own. She had all of those
9 options, Your Honor, and none of them results in a claim being
10 commenced or pursued without the leave of this Court, if leave
11 is absolutely necessary, Your Honor. And that's the point
12 that we were trying to make.

13 Your Honor, the -- there's -- you know, there's no
14 evidence that, absent an order from a court with jurisdiction,
15 that we were going to file a claim against Mr. Seery, that we
16 were going to commence or pursue a claim against Mr. Seery.
17 We were cognizant of Your Honor's order. We considered that.
18 And the reason we filed them the way we did is because,
19 according to the statutes and the case law, this is the type
20 of case that would be subject to a mandatory withdrawal of the
21 reference.

22 And so there's this paradox that arises, Your Honor. And
23 the paradox that arises is that we show up and immediately go,
24 well, we need to be back in the District Court. So we filed
25 our motion there, and I don't think that was contemptuous, it

1 wasn't intended to be contemptuous of the Court, but we showed
2 the orders to the Court, made the same arguments that we have
3 been making here, that we believe that there's problems with
4 the order, we believe the order oversteps its jurisdiction and
5 maybe is unenforceable, and it's up to that District Court, as
6 it has been in almost all of these other gatekeeper order
7 cases that get filed. None of them result in sanctions, Your
8 Honor. What they result in is a District Court deciding,
9 well, either they refer it or they decide I don't need to
10 refer it. But I don't think that that is the same thing as
11 commencing or pursuing a claim in the end, Your Honor, because
12 all we did was ask for permission, and permission could have
13 been denied or granted or granted in part.

14 Your Honor, they haven't cited an injury. You've heard
15 the testimony, Your Honor, that they -- the first time they
16 knew we had filed a motion -- which I don't understand why
17 that's the first time they knew we had filed a motion; we told
18 them we were going to file the motion -- was when I forwarded
19 an email saying that it's been denied without prejudice, Your
20 Honor. Well, that means they didn't have to do any work to
21 respond to the motion. They didn't have to do any work to do
22 any of the other things.

23 And one hundred percent of the damages that they're going
24 to say they incurred is the litigation of this contempt
25 hearing or this sanction motion, as opposed to some other

1 simpler remedy, like going in to Judge Boyle and saying, Your
2 Honor, all that needs to go, which is what they eventually
3 did. But they would have had to incur those costs anyway
4 because they're now moving to enforce the reference. They
5 filed a 12(b)(6). That briefing would have existed regardless
6 of whether or not we had filed our motion, regardless of
7 whether the sanctions hearing had commenced.

8 Your Honor, I'm going to let my partner, Mr. Bridges,
9 address this part of it, if I could. I think that gets into
10 more of the questions that you asked, and I think he can
11 answer them a lot better than I can.

12 THE COURT: Okay.

13 MR. SBAITI: Thank you.

14 THE COURT: That's fine.

15 MR. BRIDGES: Thank you, Your Honor. And I do want
16 to address pointedly the questions that you're asking. First,
17 though, I was hoping to back up to some preliminary remarks
18 that you made and say that I find the 200 orders a week just
19 mindboggling. It amazes me, and puts the entire hearing in a
20 different perspective for me. I'm grateful that you shared
21 that with us.

22 Your expression of regret about naming us violators was
23 very meaningful to me. It causes me -- well, the strong words
24 in our brief were mine. I wrote them. And your expression of
25 regret causes me to regret some of those words. I'm hopeful

1 that you can understand, at least in part, our reaction out of
2 concern.

3 And Your Honor, it's awkward for me to talk about problems
4 with your order, and that's the task that's come to me, to
5 list and talk through four of them and why we think they put
6 us in a really awkward position in deciding what to do in this
7 case, in the filing of it, in where we filed it, and in how we
8 sought leave to go forward against Mr. Seery. That was
9 awkward and difficult for us, and I'm hopeful that I can
10 explain that and that you'll understand, if I'm blunt about
11 problems with the order, that I mean it very respectfully.
12 Two hundred orders a week is still very difficult for me to
13 get my mind around.

14 The four issues in the order start with the gatekeeping.
15 Then, secondly, in the preliminary remarks, I made mention of
16 the *Applewood* case and the notice that the order releases some
17 claims. Its effect of --

18 THE COURT: And by the way, I mean, you might
19 elaborate on the facts and holding of *Applewood*, because I
20 came into this thinking *Republic Supply v. Shoaf*, and for that
21 matter, as I said, *Espinosa*, were much more germane. And so,
22 you know, you'll have to elaborate on *Applewood*. I remember
23 that case, but it's just not one people cite as frequently as
24 those two.

25 MR. BRIDGES: Yes, Your Honor. And our reply brief

1 devotes a page to the case, and I'm hopeful that I can
2 remember it well enough to give you what you're looking for
3 about it, but I would point you to our reply brief on that
4 topic as well.

5 The *Shoaf* case that *Applewood* quotes from and
6 distinguishes and expressly limits, the *Shoaf* case actually
7 has been cautioned and limited and distinguished numerous
8 times, if you Shepardize it, and the *Applewood* case is the
9 leading case, and it also is from the Fifth Circuit, that
10 describes and cabins the effects of *Shoaf*. And in *Applewood*,
11 what happened is a bankruptcy confirmation order became final
12 with releases in it, and the court held that exculpatory
13 orders in a final order from the Bankruptcy Court do not have
14 res judicata effect and do not release claims unless those
15 claims are enumerated in the exculpatory order. And --

16 THE COURT: Okay. So it was about specificity more
17 than anything else, right?

18 MR. BRIDGES: Yes, Your Honor. It was a --

19 THE COURT: Okay.

20 MR. BRIDGES: -- a blanket release, a blanket --

21 THE COURT: Okay.

22 MR. BRIDGES: -- exculpatory order that didn't
23 specify what claims were released by what parties, and
24 therefore the parties didn't have the requisite notice.

25 In my mind, Your Honor, it's comparable to the Texas

1 Supreme Court's holdings on what's required in a settlement
2 release in terms of a disclaimer of reliance, --

3 THE COURT: Okay. But, again, --

4 MR. BRIDGES: -- that if you aren't --

5 THE COURT: -- it's about specificity --

6 MR. BRIDGES: Yes, Your Honor.

7 THE COURT: -- more than anything else? And then
8 we've got the U.S. Supreme Court *Espinosa* case subsequent.

9 MR. BRIDGES: Okay. Your Honor, I'm not sure what
10 *Espinosa* you're referring to. Can you tell me why that
11 applies?

12 THE COURT: Well, it was a confirmation order. It
13 was in a Chapter 13 context. And there were provisions that
14 operated to discharge student loan debt, --

15 MR. BRIDGES: Uh-huh.

16 THE COURT: -- which, of course, cannot be discharged
17 without a 523 action, a separate adversary proceeding.
18 Nevertheless, the confirmation order operated to do what 523
19 suggests you cannot do, discharge student loan debt through a
20 plan confirmation order.

21 The U.S. Supreme Court says, well, that's unfortunate that
22 the confirmation order did something which it doesn't look
23 like you can do, but no one ever objected or appealed. That's
24 my recollection of *Espinosa*. So it seems to be the same
25 holding as *Republic Supply v. Shoaf*. And what I -- why I

1 asked you to elaborate on *Applewood* is because it does seem to
2 deal with the specificity of the order versus the
3 enforceability, no?

4 MR. BRIDGES: Your Honor, if it's not obvious
5 already, I'm not prepared to argue *Espinosa*. And your
6 explanation of it is very helpful to me. I think you're right
7 that the specificity issue from *Applewood* is what we're
8 relying on. And it sounds like --

9 THE COURT: Okay. So, that being the case, how was
10 this order not specific? Okay?

11 MR. BRIDGES: That's easy, Your Honor, because it
12 doesn't say which parties are releasing which claims. And
13 what we're talking specifically about there -- as we go
14 through the order, I can show you the language -- but what
15 we're talking about specifically are the ordinary negligence
16 and breach of fiduciary duty claims that your order doesn't
17 provide for at all. Rather, it says colorability of gross
18 negligence or willful wrongdoing, if I remember the words
19 precisely, that's what must be shown to pursue a case -- a
20 cause of action against Mr. Seery, thereby -- thereby
21 indicating that claims for mere negligence, not gross
22 negligence, or breach of fiduciary duty, which is an even
23 lesser standard, that those claims are prohibited entirely.

24 And by having that kind of general all-encompassing
25 release or exculpation for potential liability involving

1 negligence, and most importantly, fiduciary duty breach under
2 the Advisers Act, that that kind of exculpation under
3 *Applewood* is not enforceable and has no res judicata effect
4 because it wasn't -- those claims weren't enumerated in the
5 order.

6 That for it to have the intended exculpatory effect, if
7 that was what was intended, that the fiduciary duty claims and
8 the parties who those claims may belong to would have to have
9 been enumerated.

10 And indeed, that kind of specificity, what was required in
11 *Applewood*, isn't even possible for a claim that hasn't yet
12 occurred for future conduct. It's not possible to enumerate
13 the details, any details, of a future claim, because the
14 underlying act -- if the underlying basis, facts for that
15 claim, haven't yet happened. It's something to happen in the
16 future.

17 And here, that's what we're dealing with. We're dealing
18 with conduct that took place well after the January and July
19 2020 orders that had that exculpatory effect. Is -- is that
20 clear?

21 THE COURT: Understood.

22 MR. BRIDGES: Thank you, Your Honor. So, the four
23 areas of the order, the four functions that the order does
24 that are problematic to us that led us to do what we have done
25 are the gatekeeping function; the release; the fact that by

1 stating sole jurisdiction, that it had a jurisdiction-
2 stripping effect; and then, finally, jurisdiction asserting,
3 where, respectfully, Your Honor, we think to some extent the
4 order goes beyond what this Court's jurisdiction is. And so
5 that not only claiming exclusive jurisdiction, but claiming
6 jurisdiction over all actions against Mr. Seery, as described
7 in the order, is going too far.

8 And those are the four issues I want to talk about one at
9 a time, and here -- I went two screens instead of one. There
10 we go. And here's the order. I have numbered the highlights
11 here out of sequence because this is the sequence that I wish
12 to talk about them and that I think their significance to our
13 decision applies.

14 Before we get into the words of this July 16, 2020 order,
15 I want to mention the January order as well. Although the
16 motion for contempt recites both orders, we don't actually
17 think the January order applies to us, because our lawsuit
18 against Mr. Seery is not about his role as a director at
19 Strand in any way. We didn't make an issue of that, other
20 than in a footnote in our brief, because we don't think that
21 distinction matters much since the orders essentially say the
22 same things.

23 I'm not sure that it matters whether we have potentially
24 violated one order or two. If Your Honor finds we've violated
25 one, I think we're on the hook regardless. If Your Honor

1 finds that we didn't violate the July order, I don't think you
2 will find that we violated the January order, either. So my
3 focus is on the July order.

4 The gatekeeping function comes from the preliminary
5 language about commencing or pursuing a claim or cause of
6 action against Mr. Seery. And it says what you want us to do
7 first before bringing such a claim.

8 The second issue of the release comes a little bit later.
9 It's the colorable claim of willful misconduct or gross
10 negligence language. In other words, because only claims of
11 willful misconduct or gross negligence can pass the bar, can
12 pass muster under this order, that lesser claims -- ordinary
13 negligence and breach of fiduciary duty -- that those claims
14 are released by this order. That's the second argument.

15 Third is your reference to sole jurisdiction and the
16 effect that that has of attempting to say that other courts,
17 courts of original jurisdiction, do not have jurisdiction
18 because it solely resides here. That's the third thing I want
19 to address.

20 And then the fourth is the notion that we have to come to
21 this Court first for any action that fits the description of
22 an action against Mr. Seery, when some actions are, through
23 acts of Congress, removed from what this Court has the power
24 to address. Under 157(d) of Title 28, Your Honor, there are
25 some kinds of actions which withdrawal of the reference is

1 mandatory, and therefore this court lacks jurisdiction to
2 address those.

3 And so those are the four issues I want to tackle,
4 starting with the first, the gatekeeping. Your Honor, Section
5 28 -- Section 959 of Title 28 appears to be precisely on
6 point. It calls -- it is called by some courts an exception
7 to the Barton Doctrine, which we believe is the only basis,
8 the Barton Doctrine, for this Court to claim that it has
9 jurisdiction or sole jurisdiction and can require us to come
10 here first. We think the Barton Doctrine is the only basis
11 for that. We haven't seen anything in the briefing from
12 opposing counsel indicating there was another basis for it.
13 We think we're talking about the Barton Doctrine here as the
14 basis for that.

15 959 is exception to the Barton Doctrine, and we think it
16 explicitly authorizes what we have done.

17 Secondly, Your Honor, the order, the gatekeeping functions
18 of the order are too broad because of its incorporation of the
19 jurisdictional problems and the release problem that we'll
20 talk about later. But for problem number one, the key issue
21 that we're talking about is 959 as an exception to the Barton
22 Doctrine. And I went the wrong way.

23 THE COURT: So, we could go down a lot of rabbit
24 trails today, and I'm going to try not to do that, but are you
25 saying the very common practice of having gatekeeping

1 provisions in Chapter 11 cases is just defective law under 28
2 U.S.C. § 959(a)?

3 MR. BRIDGES: Can I say yes and no?

4 THE COURT: Okay.

5 MR. BRIDGES: Yes, to some extent, for some claims.
6 No as to other claims to another extent. We are not saying
7 gatekeeping orders are altogether wrong, --

8 THE COURT: Okay.

9 MR. BRIDGES: -- no.

10 THE COURT: Okay.

11 MR. BRIDGES: There are problems with gatekeeping
12 orders that do more than what the law, Section 959 in
13 particular, allows them to do.

14 THE COURT: Okay. Be more explicit. I'm not -- I
15 think you're saying, no, except when certain situations exist,
16 but I don't know what the certain situations are.

17 MR. BRIDGES: And Your Honor, you're exactly right.
18 It's complicated, and it takes a long explanation. Let me
19 start --

20 THE COURT: Okay. I really want to know, --

21 MR. BRIDGES: Yeah, me, too.

22 THE COURT: -- since I do these all the time, and
23 most of my colleagues do.

24 MR. BRIDGES: Thank you, Your Honor. And 959 is on
25 the screen. Managers of any property --

1 THE COURT: Uh-huh.

2 MR. BRIDGES: -- is what we're talking about,
3 including debtors in possession. Now, it starts off by saying
4 trustees, receivers. I mean, this is exactly what the Barton
5 Doctrine is about, right? We're talking about trustees and
6 receivers, but not just them. We're also talking about
7 managers of any property, including debtors in possession, --

8 THE COURT: Uh-huh.

9 MR. BRIDGES: -- may be sued without leave of the
10 court appointing that. That's contrary to the Barton Doctrine
11 so far.

12 With respect to what I've numbered five here -- these
13 numbers are mine -- the quote is directly verbatim out of the
14 U.S. Code, but the numbering one through five is mine. With
15 respect to what acts or transactions in carrying on business
16 connected with such property.

17 And so, Your Honor, what we're talking about isn't Barton
18 Doctrine is inapplicable, or you can't have a gatekeeping
19 order for any claims, but it's about managers of property.
20 And one of the hornbook examples of this is the grocery store
21 that files for bankruptcy and then, when --

22 THE COURT: Slip-and-fall.

23 MR. BRIDGES: You've got it, Your Honor.

24 THE COURT: Uh-huh.

25 MR. BRIDGES: And because they're managing property,

1 --

2 THE COURT: So your cause of action, if it went
3 forward, is the equivalent of a slip-and-fall --

4 MR. BRIDGES: Yes, Your Honor.

5 THE COURT: -- in a grocery store?

6 MR. BRIDGES: Yes, Your Honor.

7 THE COURT: Okay. Let me skip ahead. What about the
8 last sentence of 959(a)?

9 MR. BRIDGES: 959(b)? Or 959(a)?

10 THE COURT: No, of 959(a).

11 MR. BRIDGES: What we're looking at here?

12 THE COURT: That's the sentence that I have always
13 thought was one justification for a gatekeeper provision. And
14 I know, you know, a lot of others feel the same.

15 MR. BRIDGES: Are we talking about what I have listed
16 in number five here?

17 THE COURT: No. I'm talking about the last sentence
18 of 959(a). Such actions, okay, shall be subject to the
19 general equity power of such court, you know, meaning the
20 Bankruptcy Court, so far as the same may be necessary to the
21 ends of justice, but this shall not deprive a litigant of his
22 right to a trial by jury.

23 Isn't that one of the provisions that lawyers sometimes
24 rely on in arguing a gatekeeper provision is appropriate?

25 MR. BRIDGES: Certain --

1 THE COURT: You, Bankruptcy Judge, have the power,
2 the general equity power, so far as the same may be necessary
3 to the ends of justice?

4 MR. BRIDGES: Your Honor, you bet. Absolutely, there
5 is equitable power to do more. There's no doubt that there
6 are reliance -- there is reliance on that in many instances.
7 So I'm not sure -- I'm not sure I'm responding to your point.

8 THE COURT: Well, again, I think this is the third or
9 fourth argument down the line that really you start with in
10 the analytical framework here, but I guess I'm just saying I
11 always thought a gatekeeping provision was consistent,
12 entirely consistent with 28 U.S.C. § 959(a), the last
13 sentence.

14 MR. BRIDGES: When you're dealing --

15 THE COURT: You disagree with that?

16 MR. BRIDGES: I do, Your Honor.

17 THE COURT: Okay.

18 MR. BRIDGES: And it's not that the Court lacks
19 equitable powers to do more. It's that those equitable powers
20 are affected by when management of other parties, third
21 parties' property is at issue.

22 What we're talking about is similar to yesterday's
23 contempt order. When you set the basis of describing what it
24 is that Highland's business is, that they're a registered
25 investment advisor in the business of buying, selling, and

1 managing assets -- assets, of course, are property, and that
2 property is not just Highland's, but it's third-party
3 property, as if a railroad loses luggage belonging to its
4 customers. Rather than the railroad with a trustee appointed
5 having mismanaged railroad property, we're talking about
6 third-party property here, third-party property that belongs
7 to the CLOs, about a billion dollars of assets in these CLO
8 SPEs that Highland manages.

9 And again, the slide that Mr. Sbaiti showed you showing
10 Highland, yes, they manage their own assets, the assets of the
11 Debtor, but also of the third parties, including the
12 Charitable DAF and CLO Holdco, and that the Advisers Act
13 imposes fiduciary duties on them that are unwaivable when
14 they're doing that.

15 In *Anderson*, the Fifth Circuit called 959 an exception to
16 the rule requiring court's permission for leave to sue. In
17 *Hoffman v. City of San Diego* much more recently, relying on
18 this statute again, the court rejected a *Barton* challenge and
19 called it a statutory exception. And in *Barton* itself, from a
20 century ago, the U.S. Supreme Court even acknowledged there
21 that where a receiver misappropriated the property of another
22 -- not the debtor's property, the property of another -- that
23 the receiver could still be sued personally, without leave of
24 court.

25 Absent *Barton*, absent applicability of the Barton

1 Doctrine, Your Honor, the gatekeeper order is problematic.

2 *Barton* applies where a court has appointed a trustee, and
3 I don't think, Your Honor, under the circumstances in this
4 case, that it is fair to say Mr. Seery was appointed, as
5 opposed to approved by this Court. And it involves a
6 trustee's actions under the powers conferred on him. The
7 Barton Doctrine is not about a broader exculpation of the
8 trustee.

9 Here, what the Debtor asked for in its motion for
10 approval, approval of hiring Mr. Seery, what it asked for
11 specifically in the motion was that the Court not interfere
12 with corporate decisions absent a showing of bad faith, self-
13 interest, or gross negligence, and asking the Court to uphold
14 the board's decision to appoint Mr. Seery as the CEO as long
15 as they are attributable to any rationale business purpose.

16 At the hearing, Your Honor, at the hearing, we've quoted
17 your comments saying that the evidence amply shows a sound
18 business justification and reasonable business judgment on the
19 part of the Debtor in proposing that Mr. Seery be CEO and CRO.
20 Your Honor, respectfully, those words don't sound like the
21 judge using its discretion to choose -- appoint a trustee.
22 They sound like the Court exercising deference to the business
23 judgment of a business. And appropriately so. We don't have
24 trouble with application of the business judgment rule. Our
25 problem is with application of it and the Barton Doctrine.

1 Those two do not go together. A trustee has protection
2 because it's acting under color of the court that appointed
3 it. A court that merely deferred to someone else's
4 appointment, that's not what the Barton Doctrine is about.
5 The Barton Doctrine is about the court's function that the
6 trustee takes on, not deference to the business judgment of
7 the debtor in possession or the other fiduciary appointed by
8 the court.

9 Problem one was the gatekeeping. Problem two is about the
10 release and the *Applewood* case. Your Honor, again, ordinary
11 negligence and ordinary fiduciary duty breaches do not rise to
12 the level of gross negligence and willful misconduct. And
13 because of that, the language of this order appears to be
14 barring them entirely. No entity may bring a lawsuit against
15 Mr. Seery in certain circumstances without the Bankruptcy
16 Court doing what? Determining that the cause of action
17 represents a colorable claim of willful misconduct or gross
18 negligence against Mr. Seery.

19 A breach of fiduciary duty under the Advisers Act can be
20 unintentional, it can fall short of gross negligence by miles,
21 and to exculpate Mr. Seery from those kinds of claims entirely
22 is to make him no longer a fiduciary. A fiduciary duty that
23 is unenforceable makes someone not a fiduciary. That's
24 plainly not what Mr. Seery thinks his role is. It's
25 inconsistent with the Advisers Act. And Your Honor, the

1 notion that he would not owe his clients fiduciary duties as
2 he manages their assets would require disclosures under the
3 SEC regulations. It creates all kinds of problems to state
4 that a fiduciary under the Advisers Act does not have
5 enforceable fiduciary duties. The order appears to be
6 releasing all of those. But for *Applewood's* specificity
7 requirement, it would be doing that.

8 As an asset manager under the Advisers Act, Mr. Seery is
9 managing assets belonging to CLO Holdco and The Charitable
10 DAF. That's precisely what the District Court action is
11 about, those fiduciary duties. And Mr. Seery, in describing
12 these recently in testimony here -- forgive me for reading
13 through this, Your Honor, but it is pretty short -- Mr. Seery
14 testifies, I think, from a high level, the best way to think
15 about the Debtor is that it's a registered investment advisor.
16 As a registered investment advisor, which is really any
17 advisor of third-party money over \$25 million, it has to
18 register with the SEC and it manages funds in many different
19 ways. The Debtor manages approximately \$200 million current
20 values -- it was more than that of the start of the case -- of
21 its own assets.

22 I'm pausing there, Your Honor. \$200 million of its own
23 assets, but we're about to talk about third-party assets.

24 It doesn't have to be a registered investment advisor for
25 those assets, but it does manage its own assets, which include

1 directly-owned securities, loans, from mostly related entities
2 but not all, and investments in certain funds, which it also
3 manages.

4 And then here it comes: In addition, the manager -- the
5 Debtor manages about roughly \$2 billion, \$2 billion in total
6 managed assets, around \$2 billion in CLO assets, and then
7 other entities, which are hedge funds or PE style.

8 We also had to get a very good understanding of each of
9 the funds that we manage. And as I said, the Investment
10 Advisers Act puts a fiduciary duty on Highland Capital to
11 discharge its duty to the investors. So while we have duties
12 to the estate, we also have duties, as I mentioned in my last
13 testimony, to each of the investors in the funds.

14 Now, some of them are related parties, and those are a
15 little bit easier. Some of them are owned by Highland. But
16 there are third-party investors in these funds who have no
17 relation whatsoever to Highland, and we owe them a fiduciary
18 duty both to manage their assets prudently but also to seek to
19 manage -- maximize value.

20 Those duties do not require -- requires the opposite of
21 what I mean. They don't merely require avoiding gross
22 negligence or willful wrongdoing. When you're managing assets
23 of others, the fiduciary duties that you owe are far stricter
24 than that. The highest duty known to law is a fiduciary duty.

25 The order is inconsistent with that testimony,

1 acknowledging the fiduciary duties owed to The Charitable DAF
2 and to CLO Holdco. It appears to release the Debtor -- maybe
3 not the Debtor. My slide may be wrong about that. It appears
4 to release Seery from having to uphold these duties.

5 In addition to problems with the gatekeeping under the
6 Barton Doctrine, in addition to the release problem and
7 *Applewood* and the unwaivable fiduciary duties under the
8 Advisers Act, there's also a problem with telling other courts
9 that they lack jurisdiction. Your Honor knows bankruptcy
10 court law -- bankruptcy -- and the Bankruptcy Code far better
11 than I do, I'm certain. But a first principle, I believe, of
12 bankruptcy law is that this Court's jurisdiction is derivative
13 of the District Court's. And the only doctrine I've heard of
14 that can allow this Court to exercise exclusive jurisdiction
15 of the District Court that it sits in is the Barton Doctrine,
16 which, again, is very problematic to apply in this case, for
17 the reasons we've discussed already.

18 By claiming to have -- by stating in the order that this
19 Court has sole jurisdiction, it appears to either be inclusive
20 of the District Court, which I understand Your Honor doesn't
21 think her order can be read that way, but if it's not read
22 that way, then it results in telling the District Court that
23 it doesn't have the original jurisdiction that Congress has
24 given it. And that's problematic in the order as well.

25 THE COURT: Let me ask you. If you think the word

1 "power" had been used, or "authority," versus "jurisdiction,"
2 that would have cured it?

3 MR. BRIDGES: I think there would still have been
4 other problems. Would it have cured this? I don't think so,
5 Your Honor, because, again, I think the only basis for that
6 power is the Barton Doctrine.

7 THE COURT: Okay.

8 MR. BRIDGES: To listen to opposing counsel, you'd
9 think that our jurisdictional argument was entirely about the
10 jurisdiction stripping. It's not. Frankly, Your Honor,
11 that's maybe even a lesser point. A key problem here to is
12 the assertion of jurisdiction, not over any of the claims, but
13 over all of the claims, because of 157(d), Your Honor, because
14 some claims, some causes of action, have been put outside the
15 reach of bankruptcy, the Bankruptcy Court, and those actions
16 may in some instances fit within your description of the cases
17 that are precluded here.

18 That's a problem jurisdictionally with this Court's
19 ability to say it retains jurisdiction or that it has, that it
20 asserts jurisdiction. Over what? Any kind of claim or cause
21 of action against Mr. Seery relating in any way to his role as
22 the chief executive officer and chief restructuring officer of
23 the Debtor.

24 Some claims that fit into that bucket also fit into the
25 description in 157(d) of cases that require both consideration

1 of bankruptcy law and federal laws affecting interstate
2 commerce or regulating it. Right? Some cases must fall into
3 -- under 157(d), despite having something to do with Mr.
4 Seery's role as a chief executive officer. And Your Honor,
5 the Advisers Act fiduciary duty claims asserted by Respondents
6 in the District Court are such claims. They cannot be decided
7 without considering the Advisers Act.

8 There are also RICO claims that, of course, require
9 consideration of the RICO statute. But the Advisers Act
10 claims absolutely require consideration of both bankruptcy law
11 and this Court's order exonerating -- exculpating Mr. Seery
12 from some liability, in addition to the unwaivable fiduciary
13 duties imposed by the Advisers Act.

14 The assertion of jurisdiction here blanketed, in a blanket
15 manner, over all claims against Mr. Seery in any way related
16 to his CEO role is a 157(d) problem that the order has no --
17 has no solution for and we see no way around. 157(d) requires
18 withdrawal of the reference, makes it mandatory, when a case
19 requires considerations of federal law implicating interstate
20 commerce.

21 Your Honor, we think we had to do it the way we did,
22 filing in the District Court instead of filing here, in order
23 to preserve our jurisdictional arguments. To come to this
24 Court with a motion and then what? Immediately file a motion
25 to withdraw the reference on our own motion here? To come

1 here and ask for a decision on colorability, when first
2 colorability would exclude the claims that we're trying to
3 bring, at least some of them, the mere negligence, mere
4 fiduciary duty breaches, because they don't rise to the level
5 necessarily of gross negligence or willful wrongdoing.

6 Your Honor, coming here and asking this Court to rule on
7 that may well have waived our jurisdictional objections.
8 Coming here to this Court and doing that and immediately
9 filing a motion --

10 THE COURT: I don't get it.

11 MR. BRIDGES: The ordinary --

12 THE COURT: Subject matter jurisdiction, if it's a
13 problem, it's not waivable.

14 MR. BRIDGES: The ordinary issue -- the ordinary
15 waiver rule, Your Honor, is that when you come and ask for a
16 court to rule on something, that you waive your right to -- to
17 later -- you're estopped judicially from taking the contrary
18 position.

19 THE COURT: Okay. Well, again, I don't get it. If
20 you filed your motion and I ruled in a way you didn't like,
21 you would appeal to the District Court.

22 MR. BRIDGES: Yes, Your Honor. An appeal to the
23 District Court, we would be entitled to do. I understand, no
24 matter what happens here, we can appeal to the District Court.
25 That's different from whether or not, by coming here first,

1 have we waived or have we created an estoppel situation, in
2 terms of arguing jurisdiction.

3 THE COURT: Okay.

4 MR. BRIDGES: Because of the problems with the order,
5 we thought we were in a situation where coming here would
6 waive rights that we could avoid waiving by asking in the
7 District Court.

8 In other words, there was a jurisdictional paradox: How
9 does a party ask a court to do something it believes the court
10 lacks the power to do? That's the spot we found ourselves in.
11 What were we supposed to do?

12 Your Honor, it is definitely a complex case. And coming
13 into this matter with over 2,000 filings on the docket before
14 I had ever heard of Highland was a very daunting thing, coming
15 into this case. And whether or not there's something that we
16 missed is certainly possible, but these orders that are the
17 subject of the contempt motion, these orders are not things
18 that we overlooked. These are things that we studied
19 carefully, that we did not ignore or have disdain for, but
20 that affected and changed our actions.

21 And in the Slide #3 from Mr. Morris's -- from Mr. Morris's
22 presentation, in his third slide, he quotes from the first
23 page of our motion for leave, the motion that he says exhibits
24 our contemptuous behavior.

25 The second paragraph is kind of tiny print there, Your

1 Honor, and it's not highlighted, but I'd like to read it.
2 Seery is not named in the original complaint, but this is only
3 out of an abundance of caution due to the Bankruptcy Court in
4 HCM's pending Chapter 11 proceeding having issued an order
5 prohibiting the filing of any causes of action against Seery
6 in any way related to his role at HCM, subject to certain
7 prerequisites. In that order, the Bankruptcy Court also
8 asserts sole jurisdiction over all such causes of action.

9 Your Honor, our intent was not to violate the order. Our
10 intent was to be cautious about how we proceeded, to fully
11 disclose what we were doing, and to do it in a District Court
12 that absolutely could refer the matter here to this Court for
13 a decision, but to do it in a way that didn't waive our
14 jurisdictional arguments, that didn't waive our arguments
15 regarding the release of the very claims we were trying to
16 bring, by first having to prove that they were colorful claims
17 of willful misconduct or gross negligence, when we were trying
18 to assert claims that weren't willful negligence or gross --
19 gross negligence or willful misconduct. That was what I was
20 trying to say.

21 Your Honor, this was not disregard of your order. If
22 we're wrong on the law, we're wrong on the law, but it's not
23 that we disregarded your order or lacked respect for it. We
24 disclosed it.

25 Mr. Morris has argued in the briefs that we attempted to

1 do this on an ex parte basis. Your Honor, we did not attempt
2 to do this on an ex parte basis. And if there are errors,
3 they probably are mine. I know one error is mine. On the
4 civil cover sheet in the filing in the District Court, I noted
5 and passed on that we should check the box for related case
6 and list this case on there. I did not follow up to make sure
7 that it happened, and administratively, it didn't happen. We
8 did not check the box on the civil cover sheet. Mr. Morris is
9 correct that we failed to do that. He's incorrect that that
10 was sneaky or intentional. It was my error, having noticed it
11 but not followed up.

12 Your Honor, similarly, the argument that we didn't serve
13 them with the motion I think is disingenuous. What happened,
14 Your Honor, is that counsel for the Debtor had agreed to
15 accept service of the complaint itself against the Debtor
16 before the motion for leave, and after accepting service, I
17 was under the impression that they'd be monitoring the docket,
18 especially when I emailed them, informed them that we were
19 filing the motion for leave to amend, because I was required
20 to submit a certificate of conference on that motion. I
21 informed them in a polite email. The polite email is not
22 quoted in their brief. It is included in the record, and it's
23 quoted in full in our brief.

24 The email exchange indicates to them, Thank you for
25 pointing out the Court's orders. We've carefully studied them

1 and we don't think what we're doing is a violation of those
2 orders.

3 That we didn't serve them is because we thought they
4 already knew that the motion was coming and would be
5 monitoring the docket, and we didn't know which lawyers they
6 were going to have make an appearance in that case, so we
7 wouldn't have known who to serve. But if not serving them --
8 first, the Rules do not require that service. But if not
9 serving them out of politeness --

10 THE COURT: Mr. Morris is standing up. Did --

11 MR. MORRIS: I move to strike all of this, Your
12 Honor. If Counsel wants to take the stand and raise his hand,
13 he should testify under oath. I'm just going to leave it at
14 that. He's not on their witness list.

15 THE COURT: All right. I overrule. You can
16 continue.

17 MR. BRIDGES: Thank you, Your Honor.

18 If failure to serve them was an error, it was mine. I
19 know of no rule that requires it.

20 THE COURT: Can I ask you, you were talking about the
21 cover sheet mistake in not checking the box. What about your
22 jurisdictional statement in the actual complaint not
23 mentioning 28 U.S.C. § 1334 as a possible basis for subject
24 matter jurisdiction? Do you think that was a mistake as well,
25 or was that purposeful, not necessary?

1 MR. BRIDGES: Candidly, Your Honor, standing here
2 right now, I have no recollection whatsoever of it.

3 THE COURT: You mention 28 U.S.C. § 1331, and then
4 1367 supplemental jurisdiction, but you don't mention 1334.

5 MR. BRIDGES: I suspect it's true, but Mr. Sbaiti
6 would have written that.

7 THE COURT: Okay.

8 MR. BRIDGES: I have no recollection of --

9 THE COURT: Okay.

10 MR. BRIDGES: -- making any decision at all --

11 THE COURT: All right.

12 MR. BRIDGES: -- with regards to that.

13 THE COURT: Okay.

14 MR. BRIDGES: Your Honor, you've been very patient
15 with a very long opening argument, and I'm very grateful for
16 that. Please know that we take this Court's order seriously.
17 We voluntarily appeared here before the Court ordered us to do
18 so by filing our motion asking for a modification of the order
19 we're accused now of having been in violation of.

20 And the last thing I'd like to say, Your Honor, Mr.
21 Morris's brief claims that the first he knew of the motion,
22 the motion seeking leave to add Mr. Seery to the District
23 Court claim, the first he knew of that was when Mr. Sbaiti
24 forwarded him the District Court's order dismissing that
25 motion, denying that motion without prejudice.

1 Your Honor, in a civil contempt proceeding, where the
2 issue is compensating, not punishing, if the aggrieved party
3 didn't even know about the action until it had been denied by
4 the District Court, we submit that there can be no harm from
5 that having taken place.

6 That's all I have for opening. Thank you, Your Honor.

7 THE COURT: All right. Thank you.

8 Before we give you a time check, do we have other opening
9 statements?

10 MR. ANDERSON: Yes. Yes, Your Honor. Michael
11 Anderson on behalf of Mr. Patrick. If we need to take a
12 break, that's fine, too.

13 THE COURT: Well, how long do you plan to use?

14 MR. ANDERSON: No more than ten minutes, for sure.

15 THE COURT: Let's go ahead and do that, and then
16 we'll take a break.

17 MR. POMERANTZ: Your Honor, after, I would ask the
18 opportunity to respond to Mr. Bridges' argument. Probably
19 another ten minutes.

20 THE COURT: All right. Let's go ahead and take a
21 ten-minute break. And Mr. Taylor, you're going to have
22 something, because you --

23 MR. TAYLOR: Five.

24 THE COURT: Okay. We'll take a ten-minute break.

25 And Nate, can you give them a time?

1 THE CLERK: I'm showing it was about 59-1/2 minutes.

2 THE COURT: Fifty-nine and a half? And is that
3 subtracting some for my questioning?

4 THE CLERK: I stopped whenever you talked, maybe a
5 little over --

6 THE COURT: Okay. So he stopped it whenever I asked
7 questions and you answered, so 59 minutes has been used by the
8 Respondents.

9 All right. We'll take a ten-minute break. We'll come
10 back at 11:35.

11 THE CLERK: All rise.

12 (A recess ensued from 11:25 a.m. to 11:37 a.m.)

13 THE COURT: All right. We're going back on the
14 record in the Highland matter. We have further opening
15 statements. Counsel, you may proceed.

16 OPENING STATEMENT ON BEHALF OF MARK PATRICK, RESPONDENT

17 MR. ANDERSON: Thank you. May it please the Court,
18 Counsel. Michael Anderson on behalf of Respondent, Mark
19 Patrick.

20 Your Honor, after listening to this and looking at the
21 filings in this case, this issue of whether there's contempt
22 -- and I would argue there's not -- is ripe for decision. We
23 have no real undisputed facts for purposes of the contempt
24 issue. We have your Court's July order, the subject of Mr.
25 Bridge's arguments. We have the Plaintiffs in the underlying

1 lawsuit at issue. They commenced the lawsuit in April of this
2 year. There's absolutely nothing improper about that filing.
3 It's not subject to the contempt. A week later, there is a
4 motion for leave to add Mr. Seery. That's the issue. There's
5 no dispute over that. There's no dispute that Mr. Patrick
6 authorized the filing of the motion for leave.

7 And so then the question becomes we look at the Court's
8 July order, did a motion for leave, did that violate the terms
9 of the order? The motion for leave is not commencing a
10 lawsuit. It's also not pursuing a claim, because whether or
11 not the Court grants the motion, denies the motion, or
12 whatever the Court does, nothing happened, because the day
13 after the motion for leave was filed it was dismissed *sua*
14 *sponte* without prejudice because not all parties had been
15 served in the case.

16 It was permission asked one day. The matter was mooted
17 the following day by the District Court. And so that is
18 completely undisputed.

19 And so the question is, is asking permission, is that
20 commence? I think everybody says there's no way that's
21 commencing a lawsuit because you have asked permission. The
22 question, then, is it pursuing a claim? And the argument,
23 well, no, that's not pursuing a claim; it's asking permission.

24 And I think it's also important to note that when the
25 motion for leave was filed, there were no secrets there. I

1 mean, I'm coming in this after the fact, representing Mr.
2 Patrick. You look at a motion for leave, and right there on
3 Page 1 it talks about Your Honor's order. Page 2, it quotes
4 the order and it gives the reasons, there's arguments being
5 made as to why that order doesn't bar adding Mr. Seery as a
6 defendant in the lawsuit, many of the arguments that Mr.
7 Bridges made.

8 So that's where we are. And so when I hear, hey, we've
9 got six hours, three hours and three hours, and we're going to
10 split this up, you know, maybe too simplistic from Fort Worth,
11 but I'm like, wait a second, this is all undisputed. It's
12 totally undisputed. The -- whether or not the prior order is
13 enforceable or not enforceable, those are all legal arguments.
14 You know, no witnesses are necessary for that. And as I
15 understood, right before we broke, counsel stood up and he's
16 going to do what generally doesn't happen in opening
17 statements, which is respond to opening statements, which
18 shows that that's a legal issue.

19 And so it really does come down to undisputed facts.
20 There's no testimony. No -- nothing is necessary. And a lot
21 of what this comes down to is the old statement, you know, is
22 it better to ask forgiveness or permission? And usually that
23 statement comes up when somebody has already done something:
24 Hey, I'm going to go do it anyway and I'll ask for forgiveness
25 later. Well, what the Plaintiffs in the underlying case did

1 was ask permission. Motion for leave. That is not
2 contemptuous. And there's literally no damages. As was
3 pointed out, by the time counsel found out, it had already
4 been dismissed.

5 The last thing I want to point out, Your Honor, is that
6 the argument from opposing counsel was, well, under Rule 15 of
7 the Federal Rules of Civil Procedure, since parties hadn't
8 answered yet, the Plaintiffs in the underlying case could have
9 just simply added Mr. Seery as a defendant and moved on that
10 way, but then that would be another ball of wax and then we
11 would be addressing issues as far as whether or not there is a
12 violation of the Court's order, notwithstanding Mr. Bridge's
13 arguments. But then we would have those issues. But that's
14 not what happened. Everybody knows that's not what happened.
15 It was a motion for leave that was resolved the following day.

16 And so, Your Honor, for those reasons, and those
17 undisputed reasons, we would request that the Court at the end
18 of this hearing deny the request for sanctions and a contempt
19 finding against our client, Mr. Patrick.

20 Mr. Phillips is going to address one brief issue
21 bankruptcy-wise I believe that was raised earlier.

22 THE COURT: Okay. Mr. Phillips?

23 MR. PHILLIPS: Your Honor, thank you very much.
24 Louis M. Phillips on behalf of Mark Patrick.

25 The only thing that I would point out, Your Honor, and I'm

1 going to do -- try to simplistically, because that's about the
2 level at which I operate, boil down the questions about the
3 order.

4 This order was an employment order. The problem that Mr.
5 Bridges has elucidated to Your Honor is that the precise
6 effect, one of the precise effects of that order is to bar the
7 claims of third parties that arise into the future on the
8 basis of the employment of Mr. Seery, because the order
9 required that all claims asserting gross negligence or willful
10 misconduct need to be brought before you to determine that
11 they're colorable.

12 One question I have is, does it apply to the lawsuit that
13 was filed? Doesn't apply unless the effect of the order was
14 to release those claims and preclude any party from bringing
15 those claims at all. And while you can say correctly that
16 this Court issues gatekeeper orders all of the time, one thing
17 I cannot imagine that you would say is that in employment
18 orders you release claims of third parties existing and as may
19 arise in the future that could be brought against the party
20 employed to be a CRO of a debtor, who, by his own testimony,
21 says we do all kinds of stuff in the billions of dollars for
22 third parties that we owe fiduciary duties to.

23 There's no way, Your Honor, that you were considering your
24 July order to bar third-party claims arising from breach of
25 fiduciary duties by Mr. Seery to third parties who held third-

1 party claims that did not involve some assertion that, in his
2 capacity as CRO, he was in some way acting within the scope of
3 his authority as CRO for the Debtor and yet committed
4 negligence against the Debtor.

5 Now, if the order was asserting that you know what a lot
6 of people in this courtroom know, that the standard of
7 liability for a CRO doing work for a debtor, just like the
8 standard of liability for the president of a corporation or an
9 officer of the corporation, is as long as you're within the
10 course and scope of your employment, your actions for the
11 corporation have -- can -- the corporation takes care of you
12 because there's no personal claim unless you're outside the
13 scope, and you're outside the scope if you commit gross
14 negligence or willful misconduct.

15 That, if you're restating the standard of care and
16 standard of liability for a CRO, we have no problem with that,
17 because Mr. Patrick did not authorize a cause of action
18 arising against Mr. Seery against the Debtors for damage to
19 the Debtors. He authorized the filing of a complaint in the
20 District Court with jurisdiction for a third-party claim for
21 breach of a fiduciary duty to a third party that Mr. Seery
22 admits he owes, and then sought leave because they didn't
23 understand the order that Your Honor issued. It couldn't have
24 been to release the breach of fiduciary duty claims that
25 wouldn't rise to gross negligence or willful misconduct, it

1 couldn't be that, but it might be. But if it did, under an
2 employment order? That's very different from *Espinosa*, that's
3 very different from *Shoaf*, when you're at the end of a case in
4 a confirmation of a plan and you're talking about matters
5 arising in the past.

6 This order, if it has the effect it could be read to have,
7 precludes any third party from asserting a breach of fiduciary
8 duty against Seery for actions that violate the duty to that
9 third party, when Seery's biggest job, it looks to us like, is
10 running third-party money. That could not have been what Your
11 Honor was thinking.

12 And so all I'm pointing out is I'm trying to distill down.
13 The lawsuit doesn't involve gross negligence or willful
14 misconduct allegations. It involves breach of fiduciary duty,
15 breach of the Advisers Act, et cetera, et cetera. Mr. Patrick
16 authorized that lawsuit.

17 Now, what we're here for today is to determine whether the
18 complaint, which was not against the Debtor -- which was not
19 against Seery, the motion for leave, which did not -- all they
20 did was ask for permission, not forgiveness. And we can't
21 understand how the Debtor should be saying, all they had to do
22 was amend. Well, if they amended, would we be in hotter water
23 than we are today for asking for permission to sue? I think
24 we would have been, that should have been the prescribed
25 course, when we are more concerned and we are more risk-averse

1 by asking for leave rather than just amending by right.

2 Absolutely, that makes no sense. We can't be held to be more
3 contemptuous because we asked for permission, when we could
4 have just sued him, because they're saying asking for
5 permission was wrong. Certainly, suing him would have been
6 wrong. That would have been easier.

7 THE COURT: But Mr. Phillips, the issue is you all
8 didn't come to the Bankruptcy Court and ask permission.

9 MR. PHILLIPS: Look at your order, Your Honor.

10 THE COURT: It's right in front of me.

11 MR. PHILLIPS: Right. That order either doesn't
12 apply to the claims that were brought or it released the
13 claims that were brought. That's our point. It couldn't have
14 released them. Does it apply to them? Thank you.

15 THE COURT: Okay. Mr. Taylor?

16 MR. TAYLOR: Good morning.

17 THE COURT: Good morning.

18 OPENING STATEMENT ON BEHALF OF JAMES DONDERO

19 MR. TAYLOR: Your Honor, Clay Taylor on behalf of Jim
20 Dondero. I'll be very brief because I know we've already
21 spent a lot of time on opening argument. But I do think it is
22 appropriate to, one, first look at who brought the lawsuit,
23 CLO Holdco & DAF. That was authorized -- it's undisputed it
24 was authorized by Mr. Patrick. There is no dispute about
25 that. There's no dispute who the Plaintiffs are. But yet my

1 client is up here as an alleged violator.

2 I think it's very clear, as all the parties have said,
3 there's no dispute as to there's an order, there was a
4 complaint, and there was a motion for leave.

5 It seems to me that the rest of the evidentiary hearing
6 that you may be about to go through is going to be about pin
7 the blame on Mr. Dondero. It is undisputed that he is not a
8 control person for the DAF or CLO Holdco. The only type of
9 evidence you will hear is going to be insinuation that he
10 somehow controls Mr. Patrick and used to control Mr. Scott.
11 There will be no direct evidence that he authorized this or
12 that he's the control person and the proper corporate
13 authorized representative that signed off on the --

14 It seems to me, Your Honor, first of all, that's a
15 discrete issue that should be able to be decided separately
16 from this, and the first gating issue is, was there indeed a
17 violation of this Court's order? It would seem to me that
18 there is no disputes about those facts and that we should
19 bifurcate that, and if you then find that there is a violation
20 and find that there is any even need to move into who the
21 alleged violators are, that then we could have that
22 evidentiary portion. But there is no reason to do that now
23 before there's even been found to be a violation.

24 THE COURT: All right. Thank you.

25 All right. Well, someone made the point rebuttals in

1 opening statements are not very common, --

2 MR. POMERANTZ: Your -- Your --

3 THE COURT: -- but you can use your three hours
4 however you want.

5 OPENING STATEMENT ON BEHALF OF THE DEBTOR

6 MR. POMERANTZ: Your Honor, I didn't intend to stand
7 up.

8 THE COURT: Okay.

9 MR. POMERANTZ: I also didn't intend to have the
10 motion to modify the sealing order presented to Your Honor,
11 which it was in the course of that opening argument. And
12 despite your comments at the beginning of the hearing, the
13 Movants have taken Your Honor down a series of rabbit holes
14 that have really no relevance to the contempt motion. And
15 notwithstanding, as I said, your ruling that basically the
16 contempt would go first and the modification would go second,
17 there they were, persistent in making all the arguments why
18 this Court should modify the order.

19 They're just really trying to obfuscate the simple issue
20 that Mr. Morris presented and raised at the beginning of the
21 hearing: Did they violate the order by pursuing a claim? We
22 think the answer is undoubtedly yes.

23 I'm not going to try to address each of the issues they
24 raised in connection with the modification motion in detail.
25 I have a lengthy presentation. I'll do it at the appropriate

1 time. But there are a few issues I want to address. I want
2 to address one of the last points Mr. Bridges raised first.
3 If they thought that the order was a problem, they could have
4 filed their motion to modify that order before Your Honor.
5 They could have had that heard first. There was no statute of
6 limitations issue in connection with the HarbourVest matter.
7 They could have come to Your Honor to do that. But no, they
8 didn't. They went to the District Court first, and it was
9 only after we filed our contempt motion that they came back
10 and said, well, Your Honor, you should modify the order.
11 Their argument that if they did that there would have been
12 waiver and estoppel is just an after-the-fact justification
13 for what they did and what they tried to do, which was
14 unsuccessful. They tried to have the District Court make the
15 decision.

16 And why? Your Honor, they've filed motions to recuse
17 before Your Honor. They -- they -- it's no secret the disdain
18 they have for Your Honor's rulings as it relates to them.
19 They wanted to be out of this courtroom and in another
20 courtroom.

21 And their belated argument, Mr. Bridges falling on the
22 sword, that they failed to check the box, inadvertent, it's on
23 me, it's very curious. Because if they had done so and had
24 referred to the correct 1334 jurisdictional predicate, as Your
25 Honor had mentioned, the complaint would have been referred to

1 this Court and the entire trajectory of the proceedings would
2 have been different. They would have had the opportunity to
3 take their shot to go to District Court and argue that your
4 order didn't apply.

5 Your Honor, they say the January 9th order is not
6 relevant. It is entirely relevant. It covered the
7 independent directors and their agents. Yes, Mr. Seery is an
8 independent director, but he was also an agent of the
9 independent directors and carried out the duties. You heard
10 argument at the July 16th hearing that Mr. Seery had been
11 acting as the chief executive officer for several months. And
12 why is it important? Mr. Bridges said, well, if we violated
13 one order, we violated the other. It's important because,
14 Your Honor, number one, Mr. Dondero supported that order. We
15 would never have had an independent board in this case if Mr.
16 Dondero, the decision-making -- of the Debtor at that time,
17 supported that order and supported the exculpations that are
18 now claimed to have been invalid.

19 And also Your Honor heard testimony at the confirmation
20 hearing that the independent directors would never have taken
21 this job, would never have taken this job because of the
22 potential for litigation, litigation that we've now had to
23 endure for several months. So to come back 16 months later
24 and say, well, you know, you couldn't really exculpate them,
25 it's really an employment order: It was an employment order.

1 They know it. We know it. Your Honor knows it. It was a
2 resolution of corporate governance issues that changed the
3 whole trajectory of the case, and luckily it -- luckily, Your
4 Honor approved it.

5 The question just is whether they violated the order,
6 period. And I'll have a lot to say about res judicata, but I
7 won't go in too much in detail, but I will just briefly
8 address their arguments. They're correct and the Court is
9 correct that there's a difference between *Applewood* and *Shoaf*.
10 And Your Honor got the exact difference. In one case, a
11 release was not specific, *Applewood*. In one case it was.
12 *Shoaf* hasn't been discredited by *Applewood*. It was different
13 facts. In fact, *Shoaf* relied on two Supreme Court cases, the
14 *Stoll* case and the *Chicot* case, both for the propositions that
15 a court that enters an order, a clear order, even if it didn't
16 have jurisdiction, that cannot be attacked in res judicata.
17 So here what we have is clear, unambiguous, you come to this
18 Court before commencing or pursuing a claim. That's the
19 clarity. The focus on the releases, that's not what we're
20 here for today, that's not what we're here for on a contempt
21 motion, on whether the release covered them or it didn't cover
22 them. We're here on the clear issue of did they violate the
23 language, and we submit that they did.

24 And similarly, *Espinosa* applies. Your Honor, just to
25 quote some language, "Appellees could have moved to remand the

1 action to state court after it improperly -- after its
2 improper removal to the federal court or challenge the
3 district court's exercise in jurisdiction on direct appeal.
4 Because they did neither, they are now barred by principles of
5 res judicata."

6 Res judicata actually does apply, and I will speak about
7 it in much more detail in the modification motion.

8 With respect to *Barton*, Your Honor, we disagree with their
9 argument that Mr. Seery is not a court-appointed agent. We've
10 briefed it extensively in our motion to modify. *Barton*
11 applies to debtors in possession. *Barton* applies to general
12 partners of the debtor. *Barton* applies to chief restructuring
13 orders -- officers who are approved by the debtor. And it
14 applies to general counsel who are appointed by the chief
15 restructuring order. Officer.

16 So the argument that *Barton* is somehow inapplicable is
17 just wrong. Your Honor knows that. Your Honor has written
18 extensively on *Barton* in connection with your *Ondova* opinion.

19 Some of the argument about 959 is all wrong, as well.
20 Your Honor got it right that 959 applies to slip-and-fall
21 cases or torts, injuries to parties that are strangers to this
22 process. There is a legion of cases that I will cite to Your
23 Honor in connection with argument. 959 does not apply here.
24 There's nothing more core to this case than the transactions
25 surrounding the resolution of the HarbourVest claims.

1 We also disagree, Your Honor, that the complaint is
2 subject to mandatory withdrawal of the reference. We've --
3 one of our exhibits in the motion to modify is our motion to
4 enforce the reference. We think Movants have it completely
5 wrong. This is not the type of case that will be subject to
6 withdrawal -- mandatory withdrawal of the reference, and in
7 any event, for this contempt motion, it's irrelevant.

8 And they argue -- one of the other points Mr. Bridges
9 raises is that, because this Court would not have had
10 jurisdiction under 157 because of the mandatory withdrawal,
11 then Your Honor could not legally act as a gatekeeper. But
12 they haven't addressed *Villegas v. Schmidt*. We've raised it
13 throughout this case. And again, in these series of
14 pleadings, they don't even address it. And *Villegas v.*
15 *Schmidt* was a *Barton* case. It was a *Barton* case where the --
16 where the argument was that *Barton* does not apply because it's
17 a *Stern* claim and the Bankruptcy Court would not have
18 jurisdiction. And *Villegas* said no, it does apply. And Your
19 Honor even cited that in your *Ondova* case. And why does it
20 apply? Because there's nothing inconsistent with a Bankruptcy
21 Court having exclusive decision to make a *Barton*
22 determination.

23 In fact, in that case *Villegas* said, you can't go to the
24 District Court for that decision, it is the Bankruptcy Court's
25 decision.

1 So, again, it's a red herring, Your Honor. Your Honor had
2 the ability to act as an exclusive gatekeeper for these types
3 of actions.

4 With that, Your Honor, I'll leave the rest of my argument
5 for the next motion.

6 THE COURT: All right. Thanks.

7 All right. Nate, let's give everyone their time.

8 THE CLERK: That was just about eight and a half
9 additional from the Debtor, and then altogether the other ones
10 were just shy of fourteen minutes. Thirteen minutes and fifty
11 seconds for the other three combined. Do you want me to --

12 THE COURT: Yes, I meant for Debtor combined versus
13 --

14 THE CLERK: Oh. Oh.

15 THE COURT: Respondents combined.

16 THE CLERK: So that would be twenty one and a half
17 the Debtor. Let me do the math on the other one. Be an hour
18 twelve minutes and fifty seconds for --

19 THE COURT: Okay. All right. Got that? Debtors
20 used a total of twenty one and a half minutes; Responders have
21 used an hour twelve minutes and fifty seconds.

22 All right. Mr. Morris, you may call your first witness.

23 MR. MORRIS: Thank you very much, Your Honor. The
24 Debtor calls Mark Patrick.

25 THE COURT: All right. Mr. Patrick? Please approach

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1 our witness stand and I'll swear you in. Please raise your
2 right hand.

3 (The witness is sworn.)

4 THE COURT: All right. Please take a seat.

5 MARK PATRICK, DEBTOR'S WITNESS, SWORN

6 DIRECT EXAMINATION

7 BY MR. MORRIS:

8 Q Good afternoon, Mr. Patrick.

9 A Good afternoon.

10 Q Can you hear me okay?

11 A Yes, I can.

12 Q Okay. You have before you several sets of binders.

13 They're rather large. But when I deposed you on Friday, we
14 did that virtually. Now, I may direct you specifically to one
15 of the binders or one of the documents from time to time, so I
16 just wanted you to know that those were in front of you and
17 that I may be doing that.

18 Mr. Patrick, since March 1st, 2001 [sic], you've been
19 employed by Highland Consultants, right?

20 A I believe the name is Highgate Consultants doing business
21 as Skyview Group.

22 Q Okay. And that's an entity that was created by certain
23 former Highland employees, correct?

24 A That is my understanding, correct.

25 Q And your understanding is that Mr. Dondero doesn't have an

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1 ownership interest in that entity, correct?

2 A That he does not. That is correct.

3 Q And your understanding is that he's not an employee of
4 that -- of Skyview, correct?

5 A That is correct.

6 Q Prior to joining Skyview on March 1st, you had worked at
7 Highland Capital Management, LP for about 13 years, correct?

8 A Correct.

9 Q Joining in, I believe, early 2008?

10 A Correct.

11 Q Okay. I'm going to refer to Highland Capital Management,
12 LP from time to time as HCMLP. Is that okay?

13 A Yes.

14 Q While at HCMLP, you served as a tax counselor, correct?

15 A No, I would like to distinguish that. I did have the
16 title tax counsel. However, essentially all my activities
17 were in a non-lawyer capacity, being the client
18 representative. I would engage other outside law firms to
19 provide legal advice.

20 Q Okay. So you are an attorney, correct?

21 A Yes, I am.

22 Q But essentially everything you did at Highland during your
23 13 years was in a non-lawyer capacity, correct?

24 A Correct.

25 Q In fact, you didn't even work in the legal department; is

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1 that right?

2 A That is correct. I worked for the tax department.

3 Q Okay. Let's talk about how you became the authorized
4 representative of the Plaintiffs. You are, in fact,
5 authorized representative today of CLO Holdco, Ltd. and
6 Charitable DAF, LP, correct?

7 A Charitable DAF Fund, LP. Correct.

8 Q And those are the two entities that filed the complaint in
9 the United States District Court against the Debtor and two
10 other entities, correct?

11 A Correct.

12 Q And may I refer to those two entities going forward as the
13 Plaintiffs?

14 A Yes.

15 Q You became the authorized representative of the Plaintiffs
16 on March 24th, 2021, the day you and Mr. Scott executed
17 certain transfer documents, correct?

18 A Correct.

19 Q And you had no authority to act on behalf of either of the
20 Plaintiffs before March 24th, correct?

21 A Correct.

22 Q The DAF controls about \$200 million in assets, correct?

23 A The Plaintiffs, you mean? CLO Holdco and Charitable DAF
24 Fund, LP.

25 Q Yes.

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1 A Around there.

2 Q Okay. Let me try and just ask that again, and thank you
3 for correcting me. To the best of your knowledge, the
4 Plaintiffs control about \$200 million in assets, correct?

5 A Net assets, correct.

6 Q Okay. And that asset base is derived largely from HCMLP,
7 Mr. Dondero, or Mr. Dondero's trusts, correct?

8 A Can you restate that question again, Mr. Morris?

9 Q Sure. The asset base that you just referred to is derived
10 largely from HCMLP, Mr. Dondero, or donor trusts?

11 A The way I would characterize it -- you're using the word
12 derived. I would characterize it with respect to certain
13 charitable donations --

14 Q Uh-huh.

15 A -- that were -- that were made at certain time periods,
16 where the donors gave up complete dominion and control over
17 the respective assets and at that time claimed a federal
18 income tax deduction for that.

19 I do -- I do believe that, as far as the donor group, as
20 you specified, Highland Capital Management, I recall, provided
21 a donation to a Charitable Remainder Trust that eventually had
22 expired and that eventually such assets went into the
23 supporting organizations. And then I do believe Mr. Dondero
24 also contributed to the Charitable Remainder Trust No. 2,
25 which seeded substantial amounts of the original assets that

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1 were eventually composed of the \$200 million. And then from
2 time to time I do believe that Mr. Dondero's trusts made
3 charitable donations to their respective supporting
4 organizations.

5 Q Okay. Thank you.

6 A Is that responsive?

7 Q It is. It's very responsive. Thank you very much. So,
8 to the best of your knowledge, the charitable donations that
9 were made that form the bases of the assets came from those
10 three -- primarily from those three sources, correct?

11 A Well, you know, there's two different trusts. There's the
12 Dugaboy Trust and the Get Good Trust.

13 Q Okay.

14 A Then you have Mr. Dondero and Highland Capital Management.
15 So I would say four sources.

16 Q Okay. All right. Thank you. Prior to assuming your role
17 as the authorized representative of the Plaintiff, you had
18 never had meaningful responsibility for making investment
19 decisions, correct?

20 A I'm sorry. You kind of talk a little bit fast. Please
21 slow it down --

22 Q That's okay.

23 A -- and restate it. Thank you.

24 Q And I appreciate that. And any time you don't understand
25 what I'm saying or I speak too fast, please do exactly what

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1 you're doing. You're doing fine.

2 Prior to assuming your role as the authorized
3 representative of the Plaintiffs, you never had any meaningful
4 responsibility making investment decisions. Is that correct?

5 A To whom?

6 Q For anybody.

7 A Well, during my deposition, I believe I testified that I
8 make investment decisions with respect to my family. Family
9 and friends come to me and they ask me for investment
10 decisions. I was -- in my deposition, I indicated to you that
11 I was a board member of a nonprofit called the 500, Inc. They
12 had received a donation of stock in Yahoo!, and the members
13 there looked to me for financial guidance. As an undergrad at
14 the University of Miami, I was a -- I was a finance major, and
15 so I do have a variety of background with respect to
16 investments.

17 Q Okay. So you told me that from time to time friends and
18 family members come to you for investing advice. Is that
19 right?

20 A That is correct.

21 Q And when you were a young lawyer you were on the board of
22 a nonprofit that received a donation of Yahoo! stock and the
23 board looked to you for guidance. Is that correct?

24 THE COURT: Just a moment. I think there's an
25 objection.

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1 MR. MORRIS: Uh-huh.

2 THE COURT: Go ahead.

3 MR. ANDERSON: So far -- relevance, Your Honor. This
4 is way out of the bounds of the contempt proceeding. You
5 know, what he did as a young person with Yahoo! stock. We're
6 here to -- he authorized the lawsuit. They filed the lawsuit.
7 That's it. Getting into all this peripheral stuff is
8 completely irrelevant.

9 THE COURT: Your response?

10 MR. MORRIS: My response, Your Honor, is very simple.
11 Mr. Patrick assumed responsibility, and you're going to be
12 told that he exercised full and complete authority over a \$200
13 million fund that was created by Mr. Dondero, --

14 THE COURT: Okay.

15 MR. MORRIS: -- that funds -- that is funded
16 virtually by Mr. Dondero, and for which -- Mr. Patrick is a
17 lovely man, and I don't mean to disparage him at all -- but he
18 has no meaningful experience in investing at all.

19 THE COURT: All right. Counsel, I overrule. I think
20 there's potential relevance.

21 And may I remind people that when you're back at counsel
22 table, please make sure you speak your objections into the
23 microphone. Thank you.

24 BY MR. MORRIS:

25 Q When you were a young lawyer, sir, you were on the board

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1 of a nonprofit that received a donation of Yahoo! stock and
2 the board looked to you for guidance, correct?

3 A Yes, correct.

4 Q And -- but during your 13 years at Highland, you never had
5 formal responsibility for making investment decisions,
6 correct?

7 A That is correct.

8 Q Yeah. In fact, other than investment opportunities that
9 you personally presented where you served as a co-decider, you
10 never had any responsibility or authority to make investment
11 decisions on behalf of HCMLP or any of its affiliated
12 entities, correct?

13 A That is correct.

14 Q And at least during your deposition, you couldn't identify
15 a single opportunity where you actually had the authority and
16 did authorize the execution of a transaction on behalf of
17 HCMLP or any of its affiliates, correct?

18 A Correct.

19 Q And yet today you are now solely responsible for making
20 all investment decisions with respect to a \$200 million
21 charitable fund, correct?

22 A Yes, but I get some help. I've engaged an outside third
23 party called ValueScope, and they have been as -- effectively
24 working as a "gatekeeper" for me, and I look to them for
25 investment guidance and advice, and I informally look to Mr.

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1 Dondero since the time period of when I took control on March
2 24th for any questions I may have with respect to the
3 portfolio. So I don't feel like I'm all by myself in making
4 decisions.

5 Q Okay. I didn't mean to suggest that you were, sir, and I
6 apologize if you took it that way. I was just asking the
7 question, you are the person now solely responsible for making
8 the investment decisions, correct?

9 A Yes.

10 Q Okay. Let's talk about the circumstances that led to the
11 filing of the complaint for a bit. On April 12, 2021, you
12 caused the Plaintiffs to commence an action against HCMLP and
13 two other entities, correct?

14 A Correct.

15 Q Okay. One of the binders -- you've got a couple of
16 binders in front of you. If you look at the bottom, one of
17 them says Volume 1 of 2, Exhibits 1 through 18. And if you
18 could grab that one and turn to Exhibit 12. Do you have that,
19 sir?

20 A It says -- it says the original complaint. Is that the
21 right one?

22 Q That is the right one. And just as I said when we were
23 doing this virtually last Friday, if I ask you a question
24 about a particular document, you should always feel free to
25 review as much of the document as you think you need to

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1 competently and fully answer the question. Okay?

2 A Okay. Thank you.

3 Q All right. You instructed the Sbaiti firm to file that
4 complaint on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And to the best of your recollection, the Plaintiffs
7 returned -- retained the Sbaiti firm in April, correct?

8 A Correct.

9 Q So the Sbaiti firm was retained no more than twelve days
10 before the complaint was filed, correct?

11 A Correct.

12 Q You personally retained the Sbaiti firm, correct?

13 A Correct.

14 Q And the idea of filing this complaint originated with the
15 Sbaiti firm, correct?

16 A Correct.

17 Q Before filing -- withdrawn. Before becoming the
18 Plaintiffs' authorized representative, you hadn't had any
19 communications with anyone about potential claims that might
20 be brought against the Debtor arising out of the HarbourVest
21 settlement, correct?

22 A That is correct.

23 Q Now, after you became the Plaintiffs' authorized
24 representative, Mr. Dondero communicated with the Sbaiti firm
25 about the complaint that's marked as Exhibit 12, correct?

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1 A Yes. After he brought certain information to myself and
2 then that I engaged the Sbaiti firm to launch an
3 investigation, I also wanted Mr. Dondero to work with the
4 Sbaiti firm with respect to their investigation of the
5 underlying facts.

6 Q Okay. Mr. Dondero did not discuss the complaint with you,
7 but he did communicate with the Sbaiti firm about the
8 complaint, correct?

9 A I believe -- yeah. I heard you slip in at the end "the
10 complaint." I know he communicated with the Sbaiti firm. I
11 can't -- I can't say what he said or didn't say with respect
12 to the -- the actual complaint.

13 Q Okay. But Mr. Dondero got involved in the process
14 initially when he brought some information to your attention
15 concerning the HarbourVest transaction, correct?

16 A Correct.

17 Q And he came to you with the HarbourVest information after
18 you assumed your role as the authorized representative of the
19 Plaintiffs on March 24th, correct?

20 A That is correct.

21 Q At the time he came to you, you did not have any specific
22 knowledge about the HarbourVest transaction, correct?

23 A I did not have specific knowledge with respect to the
24 allegations that were laid out and the facts with respect to
25 the original complaint. I think I had just had a general

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1 awareness that there was a HarbourVest something or other, but
2 the specific aspects of it, I was unaware.

3 Q Okay. And you had no reason to believe that Mr. Seery had
4 done anything wrong with respect to the HarbourVest
5 transaction at the time you became the Plaintiffs' authorized
6 representative, correct?

7 A That is correct.

8 Q But you recall very specifically that some time after
9 March 24th Mr. Dondero told you that an investment opportunity
10 was essentially usurped or taken away, to the Plaintiffs' harm
11 and for the benefit of HCMLP, correct?

12 A That is correct.

13 Q And after Mr. Dondero brought this information to your
14 attention, you hired the Sbaiti firm to launch an
15 investigation into the facts, correct?

16 A Correct.

17 Q You had never worked with the Sbaiti firm before, correct?

18 A That is correct.

19 Q And you had hired many firms as a tax counselor at HCMLP,
20 but not the Sbaiti firm until now. Correct?

21 A That is correct.

22 Q You got to the Sbaiti firm through a recommendation from
23 D.C. Sauter, correct?

24 A Correct.

25 Q Mr. Sauter is the in-house counsel, the in-house general

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1 counsel at NexPoint Advisors, correct?

2 A Correct.

3 Q You didn't ask Mr. Sauter for a recommendation for a
4 lawyer; he just volunteered that you should use the Sbaiti
5 firm. Correct?

6 A That is correct.

7 Q And you never used -- considered using another firm, did
8 you?

9 A When they were presented to me, they appeared to have all
10 the sufficient skills necessary to undertake this action, and
11 so I don't recall interviewing any other firms.

12 Q Okay. Now, after bringing the matter to your action, Mr.
13 Dondero communicated directly with the Sbaiti firm in relation
14 to the investigation that was being undertaken. Correct?

15 A That is correct.

16 Q But you weren't privy to the communications between Mr.
17 Dondero and the Sbaiti firm, correct?

18 A I did not participate in those conversations as the --
19 what I, again, considered Mr. Dondero as the investment
20 advisor to the portfolio, and he was very versant in the
21 assets. I wanted him to participate in the investigation that
22 the Sbaiti firm was undertaking prior to the filing of this
23 complaint.

24 Q Let's talk for a minute about the notion of Mr. Dondero
25 being the investment advisor. Until recently, the entity

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1 known as the DAF had an investment advisory committee with HC
2 -- an investment advisory agreement with HCMLP. Correct?

3 A It's my understanding that the investment advisory
4 agreement existed with the Plaintiffs, CLO Holdco, as well as
5 Charitable DAF Fund, LP, up and to the end of February,
6 throughout the HarbourVest transaction.

7 Q Okay. And since February, the Plaintiffs do not have an
8 investment advisory agreement with anybody, correct?

9 A That is correct.

10 Q Okay. So Mr. Dondero, if he serves as an investment
11 advisor, it's on an informal basis. Is that fair?

12 A After I took control, he serves as an informal investment
13 advisor.

14 Q Okay. So there's no contract that you're aware of between
15 either of the Plaintiffs and Mr. Dondero pursuant to which he
16 is authorized to act as the investment advisor for the
17 Plaintiffs, correct?

18 A That is correct.

19 Q Okay. When you communicated with Grant Scott --
20 withdrawn. You know who Grant Scott is, right?

21 A Yes, I do.

22 Q He's the gentleman who preceded you as the authorized
23 representative of the Plaintiffs, correct?

24 A Yes.

25 Q Okay. You communicated with Mr. Scott from time to time

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1 during February and March 2021, correct?

2 A February and March are the dates? Yes.

3 Q Yeah. And from February 1st until March 21st -- well,
4 withdrawn. Prior to March 24th, 2021, Mr. Scott was the
5 Plaintiffs' authorized representative, correct?

6 A Correct.

7 Q And you have no recollection of discussing with Mr. Scott
8 at any time prior to March 24th any aspect of the HarbourVest
9 settlement with Mr. Scott. Correct?

10 A Correct.

11 Q And you have no recollection of discussing whether the
12 Plaintiffs had potential claims that might be brought against
13 the Debtor. Correct? Withdrawn. Let me ask a better
14 question.

15 You have no recollection of discussing with Mr. Scott at
16 any time prior to March 24th whether the Plaintiffs had
17 potential claims against the Debtor. Correct?

18 A That is correct.

19 Q You and Mr. Scott never discussed whether either of --
20 either of the Plaintiffs had potential claims against Mr.
21 Seery. Correct?

22 A Correct.

23 Q Okay. At the time that you became their authorized
24 representative, you had no knowledge that the Plaintiffs would
25 be filing a complaint against the Debtors relating to the

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1 HarbourVest settlement less than three weeks later, correct?

2 A That is correct.

3 Q Okay. Now, if you look at Page 2 of the complaint, you'll
4 see at the top it refers to Mr. Seery as a potential party.

5 Do you see that?

6 A Yes, I do.

7 Q Okay. You don't know why Mr. Seery was named --
8 withdrawn. You don't know why Mr. Seery was not named as a
9 defendant in the complaint, correct?

10 A No, I -- that's correct. I do not know why he was not
11 named. That's in the purview of the Sbaiti firm.

12 Q Okay. And the Sbaiti firm also made the decision to name
13 Mr. Seery on Page 2 there as a potential party when drafting
14 the complaint, correct?

15 A That's what the document says.

16 Q And you weren't involved in the decision to identify Mr.
17 Seery as a potential party, correct?

18 A That is correct. Again, I rely on the law firm to decide
19 what parties to bring a suit to -- against.

20 Q Okay. Okay. Do you recall the other day we talked about
21 a document called the July order?

22 A Yes.

23 Q Okay. That's in -- that's in Tab 16 in your binder, if
24 you can turn to that. And take a moment to look at it, if
25 you'd like. And my first question is simply whether this is

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1 the July order, as you understand it.

2 (Pause.)

3 A Yes, it is. I was just looking for the gatekeeper
4 provision. It looks like it's Paragraph 5. So, --

5 Q Okay. Thank you for that. About a week after the
6 complaint was filed, you authorized the Plaintiffs to file a
7 motion in the District Court for leave to amend the
8 Plaintiffs' complaint to add Mr. Seery as a defendant.
9 Correct?

10 A I authorized the filing of a motion in Federal District
11 Court that would ask the Federal District Court whether or not
12 Jim Seery could be named in the original complaint with
13 respect to the gatekeeper provision cited in that motion and
14 with respect to the arguments that were made in that motion.

15 Q Okay. Just to be clear, if you turn to Exhibit 17, the
16 next tab, --

17 A I'm here.

18 Q -- do you see that document is called Plaintiffs' Motion
19 for Leave to File First Amended Complaint?

20 A Yes.

21 Q And that's the document that you authorized the Plaintiffs
22 to file on or about April 19th, correct?

23 A Correct.

24 Q Okay. And can we refer to that document as the motion to
25 amend?

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1 A Yes.

2 Q Okay. You were aware of the July order at Tab 16 before
3 you authorized the filing of the motion to amend. Correct?

4 A Yes, because it's cited in the motion itself.

5 Q Okay. And at the time that you authorized the filing of
6 the motion to amend, you understood that the July order was
7 still in effect. Correct?

8 A Yes, because it was referenced in the motion, so my
9 assumption would be it would still be in effect.

10 Q Okay. Before the motion to amend was filed, you're -- you
11 are aware that my firm and the Sbaiti firm communicated by
12 email about the propriety of filing the motion to amend?

13 A Before it was filed? Communications between your firm and
14 the Sbaiti firm? I would have to have my recollection
15 refreshed.

16 Q I'll just ask the question a different way. Did you know
17 before you authorized the filing of the motion to amend that
18 my firm and the Sbaiti firm had engaged in an email exchange
19 about the propriety of filing the motion to amend in the
20 District Court?

21 A It's my recollection -- and again, I could be wrong here
22 -- but I thought the email exchange occurred after the fact,
23 not before. But again, I -- I just --

24 Q Okay. In any event, on April 19th, the motion to amend
25 was filed. Correct?

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1 A Correct.

2 Q That's the document that is Exhibit 17. And you
3 personally authorized the Sbaiti firm to file the motion to
4 amend on behalf of the Plaintiffs, correct?

5 A Correct.

6 Q And you authorized the filing of the motion to amend with
7 knowledge -- withdrawn.

8 Can you read the first sentence of the motion to amend out
9 loud, please?

10 A Yeah. (reading) Plaintiffs submit this motion under Rule
11 15 of the Federal Rules of Civil Procedure for one purpose:
12 to name as defendant one James P. Seery, Jr., the CEO of
13 defendant Highland Capital Management, LP (HCM) and the chief
14 perpetrator of the wrongdoing that forms the basis of the
15 Plaintiffs' causes of action.

16 Q And does that fairly state the purpose of the motion?

17 MR. SBAITI: Objection, Your Honor. Asks him to make
18 a legal conclusion about the purpose of the legal motion filed
19 in court that he didn't draft.

20 THE COURT: Okay. I overrule. You can answer if you
21 have an answer.

22 THE WITNESS: It's always been my general
23 understanding that the purpose of filing this motion was to go
24 to the Federal District Court and ask that Court of reference
25 to this Court whether or not Mr. Seery could be named with

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Patrick - Direct

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1 respect to the original complaint, citing again the gatekeeper
2 provisions and citing the various arguments that we've heard
3 much earlier.

4 BY MR. MORRIS:

5 Q Okay. You personally didn't learn anything between April
6 9th, when the complaint was filed, and April 19th, when the
7 motion to amend was filed, that caused you to authorize the
8 filing of the motion to amend, correct?

9 A That is correct.

10 Q In fact, you relied on the Sbaiti firm with respect to
11 decisions concerning the timing of the motion to amend.
12 Correct?

13 A Correct.

14 Q And you had no knowledge of whether anyone acting on
15 behalf of the Plaintiffs ever served the Debtor with a copy of
16 the motion to amend. Correct?

17 A Yes. I have no knowledge.

18 Q Okay. And you have no knowledge that the Sbaiti firm ever
19 provided my firm with a copy of the motion to amend. Correct?

20 A I cannot recall one way or another.

21 Q Okay. You never instructed anyone on behalf -- acting on
22 behalf of the Plaintiffs to inform the Debtor that the motion
23 to amend had been filed, correct?

24 A That is correct.

25 Q And that's because you relied on the Sbaiti firm on

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Patrick - Direct

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1 procedural issues, correct?

2 A That is correct.

3 Q You didn't consider waiting until the Debtor --

4 (Interruption.)

5 Q -- had appeared in the action before authorizing the
6 filing of the motion --

7 A Yeah, --

8 THE COURT: Yes. Y'all are being a little bit loud.
9 Okay.

10 A VOICE: Sorry.

11 MR. MORRIS: No problem.

12 MR. PHILLIPS: I've heard that before, Your Honor,
13 and I apologize.

14 THE COURT: I bet you have. Thank you.

15 MR. MORRIS: Admonish Mr. Phillips, please.

16 THE COURT: Okay.

17 MR. MORRIS: He's always the wild card.

18 MR. PHILLIPS: I admonish --

19 MR. MORRIS: He's always the wild card.

20 MR. PHILLIPS: I admonish myself.

21 THE COURT: All right. I think he got the message.
22 Continue.

23 BY MR. MORRIS:

24 Q You didn't consider waiting until the Debtor had appeared
25 in the action before filing the motion to amend, correct?

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Patrick - Direct

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1 A Again, I am the client and I rely upon the law firm that's
2 engaged with respect to making legal decisions as to the
3 timing and notice and appearance and what have you. I'm a tax
4 lawyer.

5 Q Okay. You wanted the District Court to grant the relief
6 that the Plaintiffs were seeking. Correct?

7 A I wanted the District Court to consider, under the
8 gatekeeper provisions of this Court, whether or not Mr. Seery
9 could be named in the original complaint. That's -- that,
10 from my perspective, is what was desired.

11 Q All right. You wanted the District Court to grant the
12 relief that the Plaintiffs were seeking, correct?

13 MR. SBAITI: Objection, Your Honor. Asked and
14 answered.

15 THE COURT: Overruled.

16 THE WITNESS: Again, I would characterize this motion
17 as not necessarily asking for specific relief, but asking the
18 Federal District Court whether or not, under the gatekeeper
19 provision, that Mr. Seery could be named on there. What
20 happens after that would be a second step. So I kind of -- I
21 dispute that characterization.

22 BY MR. MORRIS:

23 Q All right. I'm going to cross my fingers and hope that
24 Ms. Canty is on the line, and I would ask her to put up Page
25 57 from Mr. Patrick's deposition transcript.

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Patrick - Direct

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1 THE COURT: There it is.

2 MR. MORRIS: There it is. It's like magic. Can we
3 go down to Lines 18 through 20?

4 BY MR. MORRIS:

5 Q Mr. Patrick, during the deposition on Friday, did I ask
6 you this question and did you give me this answer? Question,
7 "Did you want the Court to grant the relief you were seeking?"
8 Answer, "Yes."

9 A I -- and it was qualified with respect to Lines 12 through
10 17. In my view, when I answered yes, I was simply restating
11 what I stated in Line 12. I wanted the District Court to
12 consider this motion as to whether or not Mr. Seery could be
13 named in the original complaint or the amended complaint
14 pursuant to the existing gatekeeper rules and the arguments
15 that were made in that motion. That's -- that's what I
16 wanted. And so then when I was asked, did you want the Court
17 to grant the relief that you were seeking, when I answered
18 yes, it was from that perspective.

19 Q Okay. Thank you very much. If the District Court had
20 granted the relief that you were seeking, you would have
21 authorized the Sbaiti firm to file the amended complaint
22 naming Mr. Seery as a defendant if the Sbaiti firm recommended
23 that you do so. Correct?

24 A If the Sbaiti firm recommended that I do so. That is
25 correct.

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Patrick - Direct

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1 Q Okay. Let's talk for a little bit about the line of
2 succession for the DAF and CLO Holdco. Can we please go to
3 Exhibit 25, which is in the other binder? It's in the other
4 binder, sir.

5 (Pause.)

6 Q I guess you could look on the screen or you can look in
7 the binder, whatever's easier for you.

8 A Yeah. I prefer the screen. I prefer the screen.

9 Q Okay.

10 A It's much easier.

11 Q All right. We've got it in both spots. But do you have
12 Exhibit 25 in front of you, sir?

13 A Yes, I do.

14 Q All right. Do you know what it is?

15 A This is the organizational chart depicting a variety of
16 charitable entities as well as entities that are commonly
17 referred to the DAF. However, when I look at this chart, I do
18 not look at and see just boxes, what I see is the humanitarian
19 effort that these boxes represent.

20 MR. MORRIS: Your Honor, may I interrupt?

21 THE COURT: You may.

22 MR. MORRIS: Okay.

23 BY MR. MORRIS:

24 Q I appreciate that, and when your lawyers get up to ask you
25 questions, I bet they'll want to know just what you were about

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Patrick - Direct

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1 to tell me. But I just want to understand what this chart is.
2 This chart is the DAF, CLO Holdco, structure chart. Correct?

3 A Correct.

4 Q Okay. And you were personally involved in creating this
5 organizational structure, correct?

6 A I -- yes.

7 Q Okay. And from time to time, the Charitable DAF Holdco
8 Limited distributes cash to the foundations that are above it.
9 Correct?

10 A Correct.

11 Q All right. I want to talk a little bit more specifically
12 about how this happens. The source of the cash distributed by
13 Charitable DAF Holdco Limited is CLO Holdco, Ltd., that
14 entity, the Cayman Islands entity near the bottom. Correct?

15 MR. ANDERSON: Your Honor, I have an objection.
16 Completely irrelevant. I'm objecting on relevance grounds.
17 This has nothing to do with the contempt proceeding. We've
18 already gone over that he authorized the filing of the
19 complaint, that he authorized the filing of the motion to
20 amend. It's all in the record. This is completely irrelevant
21 at this point.

22 THE COURT: Okay. Relevance objection. Your
23 response?

24 MR. MORRIS: I believe that it's relevant to the
25 Debtor's motion to hold Mr. Dondero in contempt for pursuing

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Patrick - Direct

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1 claims against Mr. Seery, in violation of the July 7 order. I
2 think an understanding of what the Plaintiffs are, how they're
3 funded, and Mr. Dondero's interest in pursuing claims on
4 behalf of those entities is relevant to the -- to the -- just
5 -- it's just against him. It's not against their clients,
6 frankly. It's just against Mr. Dondero.

7 THE COURT: I overrule.

8 MR. MORRIS: I'll try and -- I'll try and make this
9 quick, though.

10 BY MR. MORRIS:

11 Q CLO Holdco had two primary sources of capital. Is that
12 right?

13 A Two primary sources of capital?

14 Q Let me ask it differently. There was a Charitable
15 Remainder Trust that was going to expire in 2011, correct?

16 A That is correct.

17 Q And that Charitable Remainder Trust had certain CLO equity
18 assets, correct?

19 A Correct.

20 Q And the donor to that Charitable Remainder Trust was
21 Highland Capital Management, LP. Correct?

22 A Not correct. After my deposition, I refreshed my memory.
23 There were two Charitable Remainder Trusts that existed, which
24 I think in my mind caused a little bit of confusion. The
25 Charitable Remainder Trust No. 2, which is the one that

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Patrick - Direct

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1 expired in 2011, was originally funded by Mr. Dondero.

2 Q Okay. So, so the Charitable Remainder Trust that we were
3 talking about on Friday wasn't seeded with capital from
4 Highland Capital Management, it came from Mr. Dondero
5 personally?

6 A That is correct.

7 Q Okay. Thank you. And the other primary source of capital
8 was the Dallas Foundation, the entity that's in the upper
9 left-hand corner of the chart. Is that correct?

10 A No.

11 Q The -- you didn't tell me that the other day?

12 A You said -- you're pointing to the Dallas Foundation.
13 That's a 501(c)(3) organization.

14 Q I apologize. Did you tell me the other day that the
15 Dallas Foundation was the second source of capital for HCLO
16 Hold Company?

17 A No, I did not. You --

18 (Pause.)

19 Q Maybe I know the source of the confusion. Is the Highland
20 Dallas Foundation something different?

21 A Yes. On this organizational chart, you'll see that it has
22 an indication, it's a supporting organization.

23 Q Ah, okay. So, so let me restate the question, then. The
24 second primary source of capital for CLO Holdco, Ltd. is the
25 Highland Dallas Foundation. Do I have that right?

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Patrick - Direct

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1 A Yes.

2 Q Okay. And the sources of that entity's capital were
3 grantor trusts and possibly Mr. Dondero personally. Correct?

4 A In addition -- per my refreshing my recollection from our
5 deposition, the other Charitable Remainder Trust, I believe
6 Charitable Remainder Trust No. 1, which expired later, also
7 sent a donation, if you will, or assets to -- and I cannot
8 recall specifically whether it was just the Highland Dallas
9 Foundation or the other supporting organizations that you see
10 on this chart.

11 Q But the source of that -- the source of the assets that
12 became the second Charitable Remainder Trust was Highland
13 Capital Management, LP. Is that right?

14 A I think that is accurate from my recollection. And again,
15 I'm talking about Charitable Remainder Trust No. 1.

16 Q Okay. So is it fair to say -- I'm just going to try and
17 summarize, if I can. Is it fair to say that CLO Holdco, Ltd.
18 is the investment arm of the organizational structure on this
19 page?

20 A Yes.

21 Q And is it fair to say that nearly all of the assets that
22 are in there derived from either Mr. Dondero, one of his
23 trusts, or Highland Capital Management, LP?

24 A Yes. It's like the Bill Gates Foundation or the
25 Rockefeller Foundation. These come from the folks that make

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Patrick - Direct

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1 their donations and put their name on it.

2 Q Okay.

3 MR. MORRIS: Now, now, Your Honor, I'm going to go
4 back just for a few minutes to how Mr. Scott got appointed,
5 because I think that lays kind of the groundwork for his
6 replacement. It won't take long.

7 THE COURT: Okay. I have a question either --

8 MR. MORRIS: Sure.

9 THE COURT: -- for you or the witness. I'm sorry,
10 but --

11 MR. MORRIS: Sure. Yeah.

12 THE COURT: -- the organizational chart, it's not
13 meant to show everything that might be connected to this
14 substructure, right? Because doesn't CLO Holdco, Ltd. own
15 49.02 percent of HCLOF, --

16 MR. MORRIS: That --

17 THE COURT: -- which gets us into the whole
18 HarbourVest transaction issue?

19 MR. MORRIS: You're exactly right, Your Honor.

20 THE COURT: Okay.

21 MR. MORRIS: But that's just an investment that HCLO
22 Holdco made.

23 THE COURT: Right.

24 MR. MORRIS: Right? And so I -- let me ask the
25 witness, actually.

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Patrick - Direct

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1 THE COURT: Okay. Thank you. Thank you.

2 MR. MORRIS: Let me ask the witness. Yeah.

3 THE COURT: I just want my brain --

4 MR. MORRIS: Right.

5 THE COURT: -- to be complete on this chart.

6 BY MR. MORRIS:

7 Q Mr. Patrick, there are three entities under CLO Holdco,
8 Ltd. Do you see that?

9 A Yes.

10 Q And does CLO Holdco, Ltd. own one hundred percent of the
11 interests in each of those three entities?

12 A Yes.

13 Q Do you know why those three entities are depicted on this
14 particular chart? Is it because they're wholly-owned
15 subsidiaries?

16 A Correct.

17 Q Okay. And CLO Holdco, Ltd. has interests in other
18 companies. Isn't that right?

19 A It has other investments. That is correct.

20 Q And the reason that they're not depicted on here is
21 because they're not wholly-owned subsidiaries, they're just
22 investments; is that fair?

23 A That is fair.

24 MR. MORRIS: Does that--?

25 THE COURT: Yes.

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Patrick - Direct

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1 MR. MORRIS: Okay.

2 THE COURT: Uh-huh.

3 BY MR. MORRIS:

4 Q So, so let's go back to Mr. Grant for a moment. Mr.

5 Scott, rather. Mr. Dondero was actually the original general
6 partner. If you look at this chart, while it's still up here,
7 you see on the left there's Charitable DAF GP, LLC?

8 A Yes.

9 Q And the Charitable DAF GP, LLC is the general partner of
10 the Charitable DAF Fund, LP. Correct?

11 A Correct.

12 Q And on this chart, Grant Scott was the managing member of
13 Charitable DAF GP, LLC. Right?

14 A Correct.

15 Q Okay. But Mr. Dondero was the original general partner of
16 that entity, correct?

17 A That is correct. But I do want to point out, I just note
18 that the GP interest is indicating a one percent interest and
19 the 99 interest to Charitable DAF Holdco. I believe that's
20 incorrect. It's a hundred percent by Charitable DAF Holdco,
21 Ltd., and the Charitable DAF GP interest is a noneconomic
22 interest. So that should actually reflect a zero percent to
23 the extent it may indicate some sort of profits or otherwise.

24 Q Okay. Thank you for the clarification. Can you turn to
25 Exhibit 26, please, in your binder? And is it your

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Patrick - Direct

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1 understanding that that is the amended and restated LLC
2 agreement for the DAF GP, LLC?

3 A Yes.

4 Q Okay. And this was amended and restated effective as of
5 January 1st, 2012, correct?

6 A Yes.

7 Q And if you go to the last page, you'll see there are
8 signatures for Mr. Scott and Mr. Dondero, correct?

9 A Yes.

10 Q And Mr. Dondero is identified as the forming -- former
11 managing member and Mr. Scott is identified as the new
12 managing member. Correct?

13 A Correct. That's what the document says.

14 Q And it's your understanding that Mr. Dondero had the
15 authority to select his successor. Correct?

16 A Correct.

17 Q In fact, it's based on your understanding of documents and
18 your recollection that Mr. Dondero personally selected Mr.
19 Scott as the person he was going to transfer control to,
20 correct?

21 A Upon advice of Highland Capital Management's tax
22 compliance officer, Mr. Tom Surgent.

23 Q What advice did Mr. Surgent give?

24 A He gave advice that, because Mr. Dondero -- and this is
25 what I came to an understanding after the fact of this

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Patrick - Direct

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1 transaction, because I was not a part of it -- that by Mr.
2 Dondero holding that GP interest, that it would be -- the
3 Plaintiffs, if you will, would be an affiliate entity for
4 regulatory purposes, and so he advised that if he -- if Mr.
5 Dondero transferred his GP interest to Mr. Scott, it would no
6 longer be an affiliate, is my recollection.

7 Q Okay. You didn't appoint Mr. Scott, did you?

8 A No.

9 Q That was Mr. Dondero. Is that right?

10 A Yes.

11 Q Okay. Let's go to 2021. Let's come back to the current
12 time. Sometime in February, Mr. Scott called you to ask about
13 the mechanics of how he could resign. Correct?

14 A That is correct.

15 Q But the decision to have you replace Mr. Scott was not
16 made until March 24th, the day you sent an email to Mr. Scott
17 with the transfer documents. Correct?

18 A That is correct.

19 Q And it's your understanding that he could have transferred
20 the management shares and control of the DAF to anyone in the
21 world. Correct?

22 A Correct.

23 Q That's what the docu... that he had the authority under
24 the documentation, as you understood it, to freely trade or
25 transfer the management shares. Correct?

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Patrick - Direct

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1 A Wait. Now, let's be precise here.

2 Q Okay.

3 A Are you talking about the GP interests or the management
4 shares held by Charitable DAF Holdco, Ltd.?

5 Q Let's start with the management shares. Can you explain
6 to the Court what the management shares are?

7 MR. ANDERSON: Your Honor? Hang on one second. Your
8 Honor, I want to object again on relevance. We're going way
9 beyond the scope of the contempt issue, whether or not --

10 MR. MORRIS: This is about control.

11 MR. ANDERSON: -- the motion to amend somehow
12 violated the prior order of this Court. Getting into the
13 management structure, transfer of shares, that's way outside
14 the bounds. I object on relevance.

15 THE COURT: Okay. Relevance objection?

16 MR. MORRIS: Your Honor, they have probably 30
17 documents, maybe 20 documents, on their exhibit list that
18 relate to management and control. I'm asking questions about
19 management and control. Okay? This is important, again, to
20 (a) establish his authority, but (b) the circumstances under
21 which he came to be the purported control person.

22 THE COURT: Okay. Overruled. Go ahead.

23 THE WITNESS: It might be helpful to look at the
24 organizational chart, but if not -- but I'll describe it to
25 you again. With respect to the entity called --

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Patrick - Direct

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1 MR. MORRIS: Hold on one second. Can we put up the
2 organizational chart again, Ms. Canty, if you can? There you
3 go.

4 THE WITNESS: Okay. So with respect to the
5 Charitable DAF Holdco, Ltd., it is my understanding that Mr.
6 Scott, he organized that entity when he was the independent
7 director of the Charitable Remainder Trust, and he caused the
8 issuance of the management shares to be issued to himself.
9 And then those are, again, noneconomic shares, but they are
10 control shares over that entity.

11 And I think, to answer your question, is -- it -- he alone
12 decides who he can transfer those shares to.

13 BY MR. MORRIS:

14 Q Do I have this right, that whoever holds the noneconomic
15 management shares has the sole authority to appoint the
16 representatives for each of the Charitable DAF entities and
17 CLO Holdco? It's kind of a magic ticket, if you will?

18 A It -- I think there's a -- the answer really is no from a
19 legal standpoint, because Charitable DAF Holdco is a limited
20 partner in Charitable DAF Fund, LP, so it does not have
21 authority -- authority under all -- the respective entities
22 underneath that. It could cause a redemption, if you will, of
23 Charitable DAF Fund. And so, really, the authority -- the
24 trickle-down authority that you're referencing is with respect
25 to his holding of the Charitable DAF GP, LLC interest. It's a

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Patrick - Direct

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1 member-managed Delaware limited liability company. And from
2 that, he -- that authority kind of trickles down to where he
3 can appoint directorships.

4 Q All right. I think I want to just follow up on that a
5 bit. Which entity is the issuer of the manager shares, the
6 management shares?

7 A Yeah, the -- per the organizational chart, it is accurate,
8 it's the Charitable DAF Holdco, Ltd. which issued the
9 management shares to Mr. Scott.

10 Q Okay. And that's why you have the arrow from Mr. Scott
11 into that entity?

12 A Correct.

13 Q And do those -- does the holder of the management shares
14 have the authority to control the Charitable DAF Holdco, Ltd.?

15 A Yes.

16 Q Okay. And as the control person for the Charitable DAF
17 Holdco, Ltd., they own a hundred -- withdrawn. Charitable DAF
18 Holdco Limited owns a hundred percent of the limited
19 partnership interests of the Charitable DAF Fund, LP.

20 Correct?

21 A Correct.

22 Q And so does the holder of that hundred percent limited
23 partnership interest have the authority to decide who acts on
24 behalf of the Charitable DAF Fund, LP?

25 A I would say no. I mean, you know, just -- I would love to

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Patrick - Direct

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1 read the partnership agreement again. But I, conceptually,
2 what I know with partnerships, I would say the limited partner
3 would not. It would be through the Charitable DAF GP, LLC
4 interest.

5 Q The one on the left, the general partner?

6 A The general partner.

7 Q I see. So when Mr. Scott transferred to you the one
8 hundred percent of the management shares as well as the title
9 of the managing member of the Charitable DAF GP, LLC, did
10 those two events give you the authority to control the
11 entities below it?

12 A Yes.

13 Q Thank you. And so prior to the time that he transferred
14 those interests to you, is it your understanding that Mr.
15 Scott had the unilateral right to transfer those interests to
16 anybody in the world?

17 A Yes.

18 Q Okay. And you have that right today, don't you?

19 A Yes, I do.

20 Q If you wanted, you could transfer it to me, right?

21 A Yes, I could.

22 Q Okay. But of all the people in the world, Mr. Scott
23 decided to transfer the management shares and the managing
24 member title of the DAF GP to you, correct?

25 A Restate that question again?

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Patrick - Direct

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1 Q Of all the people in the world, Mr. Scott decided to
2 transfer it to you, correct?

3 A Yeah. Mr. Scott transferred those interests to me.

4 Q Okay. And you accepted them, right?

5 A Yes.

6 Q You're not getting paid anything for taking on this
7 responsibility, correct?

8 A I am not paid by any of the entities depicted on this
9 chart.

10 Q And Mr. Scott used to get \$5,000 a month, didn't he?

11 A I believe that's what he testified to.

12 Q Yeah. But you don't get anything, right?

13 A Correct.

14 Q In fact, you get the exact same salary and compensation
15 from Skyview that you had before you became the authorized
16 representative of the DAF entities and CLO Holdco. Correct?

17 A Correct.

18 MR. MORRIS: Okay. Your Honor, if I may just take a
19 moment, I may be done.

20 THE COURT: Okay.

21 (Pause.)

22 MR. MORRIS: Your Honor, I have no further questions.

23 THE COURT: All right. Pass the witness. Any
24 examination of the witness?

25 CROSS-EXAMINATION

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Patrick - Cross

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1 BY MR. ANDERSON:

2 Q Mr. Patrick, I just had a few follow-up questions. When
3 you authorized the filing of the lawsuit against Highland
4 Capital Management, LP, Highland HCF Advisor Limited, and
5 Highland CLO Funding, Limited, when that lawsuit was filed in
6 April of this year, was Mr. Seery included as a defendant?

7 A No.

8 Q Have the two Plaintiffs in that lawsuit, have they
9 commenced any lawsuit against Mr. Seery?

10 A No.

11 Q Have they pursued any lawsuit against Mr. Seery?

12 A No.

13 Q Have they pursued a claim or cause of action against Mr.
14 Seery?

15 A No.

16 Q At most, did the Plaintiffs file a motion for leave to add
17 Mr. Seery as a defendant?

18 MR. MORRIS: Objection, Your Honor. To the extent
19 that any of these questions are legal conclusions, I object.
20 He's using the word pursue. If he's trying -- if he's then
21 going to argue that, But the witness testified that he didn't
22 pursue and that's somehow a finding of fact, I object.

23 THE COURT: Okay. I understand.

24 MR. MORRIS: Yeah.

25 THE COURT: But I overrule. He can answer.

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Patrick - Cross

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1 MR. MORRIS: That's fine.

2 THE WITNESS: Can you restate the question again?

3 BY MR. ANDERSON:

4 Q Sure. On behalf of the Plaintiffs -- well, strike that.

5 Did the Plaintiffs pursue a claim or cause of action against

6 Mr. Seery?

7 A No.

8 Q At most, did the Plaintiffs file a motion for leave to

9 file an amended complaint regarding Mr. Seery?

10 A Yes. But, again, I viewed the motion as simply asking the

11 Federal District Court whether Mr. Seery could or could not be

12 named in a complaint, and then the next step might be how the

13 Federal District Court might rule with respect to that.

14 Q And we have -- it's Tab 17 in the binders in front of you.

15 That is Plaintiffs' motion for leave. If you could turn to

16 that, please.

17 A Yes. I've got it open.

18 Q Is the Court's July order, the Bankruptcy Court's July

19 order, is it mentioned on the first page and then throughout

20 the motion for leave to amend?

21 A Yes, it is. I see it quoted verbatim on Page 2 under

22 Background.

23 Q Was the Court's order hidden at all from the District

24 Court?

25 A The document speaks for itself. It's very transparent.

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Patrick - Cross

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1 Q Was there any effort whatsoever to hide the prior order of
2 the Bankruptcy Court?

3 A No.

4 MR. ANDERSON: Pass the witness.

5 THE COURT: Okay. Other examination?

6 MR. SBAITI: Yes, Your Honor. Just a couple of
7 questions.

8 CROSS-EXAMINATION

9 BY MR. SBAITI:

10 Q Do you mind flipping to Exhibit 25, which I believe is the
11 org chart, the one that you were looking at before?

12 A Okay.

13 Q It'll still be in --

14 A Okay. Yeah.

15 Q -- the defense binder. No reason to swap out right now.

16 A I've got the right binders. Some of them are repeatable
17 exhibits, so --

18 Q Yeah.

19 A -- I have to grab the right binder. Yes.

20 Q As this org chart would sit today, is the only difference
21 that Grant Scott's name would instead be Mark Patrick?

22 A Yes.

23 Q Was there ever a period of time where Jim Dondero's name
24 would sit instead of Grant Scott's name prior?

25 A Yes, originally, when this -- yes.

002075

1 Q So did Mr. Dondero both have the control shares of the GP,
2 LLC and DAF Holdco Limited?

3 A No, I believe not. I believe he only held the Charitable
4 DAF GP interest and that Mr. Scott at all times held the
5 Charitable DAF Holdco, LTD interest, until he decided to
6 transfer it to me.

7 Q Can you just tell us how Mr. Scott came to hold the
8 control shares of the Charitable DAF Holdco, LTD?

9 A When he was the independent trustee of the Charitable
10 Remainder Trust, he caused that -- the creation of that
11 entity, and that's how he became in receipt of those
12 management shares.

13 Q And does the Charitable DAF GP, LLC have any control over
14 Charitable DAF Fund, LP's actions or activities?

15 A Yes, it does.

16 Q What kind of control is that?

17 A I would describe complete control. It's the managing
18 member of that entity and can -- and effectively owns, you
19 know, the hundred percent interest in the respective
20 subsidiaries, and so the control follows down.

21 Q And when did Mr. Scott replace Mr. Dondero as the GP --
22 managing member of the GP?

23 A Well, I think as the -- and Mr. Morris had shown me with
24 respect to that transfer occurring on March 2012.

25 Q So nine years ago?

Patrick - Cross

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1 A Yes.

2 Q Does Mr. Dondero today exercise any control over the
3 activities of the DAF Charitable -- the Charitable DAF, GP or
4 the Charitable DAF Holdco, LTD?

5 A No.

6 Q Is he a board member of sorts for either of those
7 entities?

8 A No.

9 Q Is he a board members of CLO Holdco?

10 A No.

11 Q Does he have any decision-making authority at CLO Holdco?

12 A None.

13 Q The decision to authorize the lawsuit and the decision to
14 authorize the motion that you've been asked about, who made
15 that authorization?

16 A I did.

17 Q Did you have to ask for anyone's permission?

18 A No.

19 MR. SBAITI: No more questions, Your Honor.

20 THE COURT: Okay. Any -- I guess Mr. Taylor, no.

21 All right. Any redirect?

22 REDIRECT EXAMINATION

23 BY MR. MORRIS:

24 Q Since becoming the authorized representative of the
25 Plaintiffs, have you ever made a decision on behalf of those

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1 entities that Mr. Dondero disagreed with?

2 A I have made decisions that were adverse to Mr. Dondero's
3 financial -- financial decision. I mean, financial interests.
4 Whether he disagreed with them or not, I don't -- he has not
5 communicated them to me. But they have been adverse, at least
6 two very strong instances.

7 Q Have you ever -- have you ever talked to him about making
8 a decision that would be adverse to his interests? Did he
9 tell -- did --

10 A I didn't -- I don't -- I did not discuss with him prior to
11 making the decisions that I made that were adverse to his
12 economic interests.

13 MR. MORRIS: Okay. No further questions, Your Honor.

14 THE COURT: Any further examination? Recross on that
15 redirect?

16 MR. ANDERSON: No further questions.

17 MR. SBAITI: No further questions, Your Honor.

18 MR. ANDERSON: Sorry.

19 THE COURT: Nothing?

20 MR. ANDERSON: I think we're good.

21 THE COURT: Okay. I have one question, Mr. Patrick.
22 My brain sometimes goes in weird directions.

23 EXAMINATION BY THE COURT

24 THE COURT: I'm just curious. What are these Cayman
25 Island entities, charitable organizations formed in the Cayman

1 Islands?

2 THE WITNESS: Yeah. I'll keep it as simple as I can,
3 even though I'm a tax lawyer, so I won't get into the tax
4 rules, but the Cayman structure is modeled after what you
5 typically see in the investment management industry, and so I
6 -- and I won't reference specific entities here with respect
7 to the Highland case, but I think you'll note some
8 similarities, if you think about it. They're -- it's
9 described as an offshore master fund structure where you have
10 a -- and that would be the Charitable DAF Fund that's
11 organized offshore, usually in the Cayman or Bermuda Islands,
12 where the general partner, typically, in the industry, holds
13 the management --

14 THE COURT: Yeah. Let --

15 THE WITNESS: Okay.

16 THE COURT: -- me just stop you. I've seen this
17 enough --

18 THE WITNESS: Yeah, it's

19 THE COURT: -- to know that it happens in the
20 investment world. But in --

21 THE WITNESS: Yeah.

22 THE COURT: You know, usually, I see 501(c)(3), you
23 know, domestically-created entities for charitable purposes,
24 so I'm just curious.

25 THE WITNESS: Yes.

Patrick - Examination by the Court

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1 THE COURT: Uh-huh.

2 THE WITNESS: The offshore master fund structure
3 typically will have two different types of -- they call it
4 foreign feeder funds. One foreign feeder fund is meant to
5 accommodate foreign investors; the other foreign feeder fund
6 is meant to accommodate U.S. tax-exempt investors.

7 Why, why is it structured that way? In order to avoid
8 something called -- I was trying not to be wonkish -- UBTI.
9 That's, let's see, Un -- Unrelated Trader Business Income. I
10 probably have that slightly wrong. But it's essentially,
11 it's a means to avoid active business income, which includes
12 debt finance income, which is what these CLOs tend to be, that
13 would throw off income that would be taxable normally if the
14 exempts did not go through this foreign blocker, and it
15 converts that UBTI income -- it's called (inaudible) income --
16 into passive income that flows -- that flows up to the
17 charities.

18 And so it's very typical that you'll have a U.S. tax-
19 exempt investor, when they make an investment in a fund,
20 prefer to go through an offshore feeder fund, which is
21 actually Charitable DAF Holdco, LTD. That's essentially what,
22 from a tax perspective, represents as a UBTI blocker entity.
23 And then you have the offshore investments being held offshore
24 because there's a variety of safe harbors where the receipt of
25 interest, the portfolio interest exception, is not taxable.

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Patrick - Examination by the Court

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1 The creation of capital gains or losses under the -- they call
2 it the trading, 864(b) trading safe harbor, is not taxable.
3 So that's why you'll find these structures operating offshore
4 to rely on those safe harbor provisions as well as -- as well
5 as what I indicated with respect to the two type blocker
6 entities. It's very typical and industry practice to organize
7 these way. And so when this was set --

8 THE COURT: It's very typical in the charitable world
9 to --

10 THE WITNESS: In the investment management --

11 THE COURT: -- form this way?

12 THE WITNESS: In the investment management world,
13 when you have charitable entities that are taking some
14 exposure to assets that are levered, to set this structure up
15 in this way. It was modeled after -- they just call them
16 offshore master fund structures. They're known as Mickey
17 Mouse structures, where you'll have U.S. investors --

18 THE COURT: Yes. I -- yes, I --

19 THE WITNESS: -- enter through a U.S. partnership,
20 and the foreign investors enter through a blocker.

21 THE COURT: It was really just the charitable aspect
22 of this that I was --

23 THE WITNESS: Yeah. Yeah.

24 THE COURT: -- getting at.

25 THE WITNESS: Yeah. No, but I'm just trying to

1 emphasize if --

2 THE COURT: All right. It's --

3 THE WITNESS: Yeah.

4 THE COURT: -- neither here nor there. All right.

5 MR. SBAITI: Your Honor, may I ask a slightly

6 clarifying leading question on that, because I think I

7 understand what he was trying to say, just for the record?

8 THE COURT: Well, --

9 MR. MORRIS: I object.

10 THE COURT: -- I tell you what. Anyone who wants to

11 ask one follow-up question on the judge's question can do so.

12 Okay? You can go first.

13 MR. SBAITI: I'll approach, Your Honor.

14 THE COURT: Okay.

15 RECROSS-EXAMINATION

16 BY MR. SBAITI:

17 Q Would it be a fair summary of what you were saying a
18 minute ago that the reason the bottom end of that structure is
19 offshore is so that it doesn't get taxed before the money
20 reaches the charities on the U.S. side?

21 A Tax -- it converts the nature of the income that is being
22 thrown off by the investments so that it becomes a tax
23 friendly income to the tax-exempt entity. Passive income.
24 That's --

25 Q So, essentially, --

Patrick - Recross

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1 THE COURT: Okay. Okay.

2 MR. SBAITI: -- so it doesn't get taxed before it
3 hits the --

4 THE COURT: I said one question.

5 MR. SBAITI: Sorry, Your Honor.

6 THE COURT: Okay. He answered it.

7 MR. PHILLIPS: And I have one question, Your Honor

8 THE COURT: Okay.

9 MR. PHILLIPS: I don't know if I need to ask this
10 question, but I'd rather not ask you if I need to ask it.

11 THE COURT: Go ahead.

12 MR. PHILLIPS: But if I do, you know, I could --

13 THE COURT: Go ahead.

14 MR. PHILLIPS: Well, okay.

15 RECROSS-EXAMINATION

16 BY MR. PHILLIPS:

17 Q We've talked about the offshore structure. Are the
18 foundations in the top two tiers of the organizational chart
19 offshore entities?

20 A No.

21 Q They're --

22 A They're onshore entities. They're tax-exempt entities.

23 Q Thank you.

24 A The investments are offshore.

25 Q Thank you.

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Patrick - Further Redirect

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1 THE COURT: Mr. Morris? One question.

2 FURTHER REDIRECT EXAMINATION

3 BY MR. MORRIS:

4 Q Do you hold yourself out as an expert on the
5 organizational structures in the Caribbean for charitable
6 organizations?

7 A I hold myself out as a tax professional versant on setting
8 up offshore master fund structures. It's sort of a bread-and-
9 butter thing. But there are plenty of people that can testify
10 that this is very typical.

11 Q Uh-huh. Okay.

12 THE COURT: Okay. Thank you.

13 All right. You are excused, Mr. Patrick. I suppose
14 you'll want to stay around. I don't know if you'll
15 potentially be recalled today.

16 (The witness steps down.)

17 THE COURT: All right. We should take a lunch break.
18 I'm going to put this out for a democratic vote. Forty-five
19 minutes? Is that good with everyone?

20 MR. SBAITI: Do we have to leave the building to eat,
21 Your Honor, or is there food in the building?

22 THE COURT: I think --

23 MR. SBAITI: I'm sorry to ask that question, but --

24 THE COURT: Yes. You know what, there used to be a
25 very bad cafeteria, but I think it closed. Right, Mike? So,

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1 you know, --

2 MR. SBAITI: Sorry I asked that.

3 A VOICE: Hate to miss that one.

4 THE COURT: Is 45 minutes not enough since you have
5 to go off campus? I'll give you an hour. It just means we
6 stay later tonight.

7 A VOICE: Can we just say 2:00 o'clock?

8 MR. SBAITI: That's fine with us, Your Honor.

9 THE COURT: 2:00 o'clock. That's 50 minutes. See
10 you then.

11 MR. SBAITI: Thank you.

12 A VOICE: Your Honor, can we just get a time check?

13 THE COURT: Okay.

14 THE CLERK: Yeah. The Debtors are at an hour and
15 eleven minutes. Respondents at an hour nineteen.

16 THE COURT: And hour and eleven and an hour and
17 nineteen.

18 A VOICE: Wait, that's not right.

19 A VOICE: That can't be right.

20 A VOICE: Two hours? We started at --

21 THE COURT: Okay. So, again, their side, the
22 collective Respondents?

23 THE CLERK: An hour and eleven, responding to your
24 questions, --

25 A VOICE: Yeah, he's not recording --

1 THE CLERK: So an hour and eleven and an hour and
2 nineteen.

3 THE COURT: But they were already over an hour --

4 A VOICE: Yeah. It's been over three hours.

5 THE COURT: -- with opening statements.

6 THE CLERK: An hour and twelve. Yes. They were very
7 short with the questioning. It was only like --

8 THE COURT: Okay. We'll double-check that over the
9 break with the court reporter.

10 A VOICE: All right. Thank you, Your Honor.

11 THE COURT: We'll double-check and let you know.

12 THE COURT: All rise.

13 (A luncheon recess ensued from 1:09 p.m. until 2:03 p.m.)

14 THE COURT: All right. Please be seated. We're
15 going back on the record in Highland after our lunch break.
16 I'm going to confirm time. We've had the Debtor an aggregate
17 of an hour and eleven minutes. The Respondents, an aggregate
18 of an hour and twenty minutes. Okay? So we've gone two hours
19 and thirty-one minutes.

20 If it seems like we've been going longer, it's because we
21 did not do the clock on the opening matters regarding removal,
22 extension of time. And then when I interjected with
23 questions, we stopped the clock. All right? So let's go.

24 You may call your next witness, Mr. Morris.

25 MR. MORRIS: Thank you, Your Honor. The Debtor calls

Dondero - Direct

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1 James Dondero.

2 THE COURT: All right.

3 A VOICE: He had to step down the hall. We had a
4 little trouble getting through security. Let me --

5 THE COURT: All right. Mr. Dondero, you've been
6 called as the next witness. So if you'll approach our witness
7 stand, please. All right. Please raise your right hand.

8 (The witness is sworn.)

9 THE COURT: All right. Please be seated.

10 JAMES D. DONDERO, DEBTOR'S WITNESS, SWORN

11 DIRECT EXAMINATION

12 BY MR. MORRIS:

13 Q Good afternoon, Mr. Dondero.

14 A Good afternoon.

15 Q Can you hear me?

16 A Yes.

17 Q Okay. So, you were here this morning, correct?

18 A Yes.

19 Q All right. So, we're going to put up -- we'll put it up
20 on the screen, but if you'd prefer to look at a hard copy in
21 the binder that's marked Volume 1 of -- 2 of 2, I'd ask you to
22 turn to Exhibit 25. Or you could just follow on the screen.
23 And this is a one-page document, so maybe that's easier.

24 A Sure.

25 Q Do you have it? All right.

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1 A Yes.

2 Q This is the organizational chart for what's known as the
3 DAF, correct?

4 A Yes.

5 Q And Mark Patrick set up this structure, correct?

6 A I believe he coordinated. I believe it was set up by
7 third-party law firms. I believe it was Hutton or a firm like
8 that.

9 Q Mr. Patrick participated in the creation of this structure
10 because you gave him the task of setting up a charitable
11 entity for Highland at that time, correct?

12 A Yes.

13 Q And you approved of this organizational structure,
14 correct?

15 A Yes.

16 Q And Grant Scott was the Trustee of the DAF for a number of
17 years, correct?

18 A I often use that word, trustee, but technically I think
19 it's managing member.

20 Q That's right. I appreciate that. I was using your word
21 from the deposition. But is it fair to say that, to the best
22 of your knowledge, Grant Scott was the sole authorized
23 representative of the entity known as the DAF from 2011 until
24 just recently?

25 A Sole -- I would describe it more he was in a trustee

Dondero - Direct

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1 function.

2 Q Uh-huh.

3 A Advice was being provided by Highland on the investment
4 side. He wasn't expected to be a financial or an investment
5 expert. And then accounting, tax, portfolio, tracking, you
6 know, compliance with all the offshore formation documents,
7 that was all done by Highland as part of a shared services
8 agreement.

9 Q Okay. I appreciate that, but listen carefully to my
10 question. All I asked you was whether he was the authorized
11 representative, the sole authorized representative for the
12 ten-year period from 2011 until recently.

13 A Yes.

14 Q Okay.

15 A I believe so.

16 Q Thank you. You served as the managing member of the DAF
17 GP, LLC before Mr. Scott, correct?

18 A Yes.

19 Q Okay. And if you turn to Exhibit 26 in your binder,
20 that's the amended and restated limited liability company
21 agreement for the DAF GP, LLC, correct?

22 A Yes.

23 Q And on the last page, that's your signature line, right?

24 A Yes.

25 Q And you stepped down as the managing member on March 12,

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1 2012, and were replaced by Mr. Scott, correct?

2 A Yes.

3 Q And as you recall it, Mr. Scott came to be appointed the
4 trustee of the DAF based on your recommendation, right?

5 A Based on my recommendation? Yes, I would say that's fair.

6 Q And you made that recommendation to Mr. Patrick, right?

7 A I -- I don't remember who I made the recommendation to.
8 But I would echo the testimony of Mark Patrick earlier that
9 the purpose of stepping down was to make the DAF unaffiliated
10 or independent versus being in any way affiliated.

11 MR. MORRIS: I move to strike.

12 BY MR. MORRIS:

13 Q And I'd ask you to listen carefully to my question.

14 THE COURT: Sustained.

15 BY MR. MORRIS:

16 Q You made the recommendation to Mr. Patrick, correct?

17 A I would give the same answer again.

18 Q Okay.

19 MR. MORRIS: Can we please put up Mr. Dondero's
20 deposition transcript from last Friday at Page 297?

21 I believe, Your Honor, that the court reporter thought
22 that this was a continuation of a prior deposition, and that's
23 why the pages begin in the, you know, high in the 200s and not
24 at Page 1. Just to avoid any confusion.

25 BY MR. MORRIS:

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1 Q Mr. Dondero, do you see the transcript in front of you?

2 A Yes.

3 Q Okay. Were you asked this question and did you give this
4 answer? "Who did you make the" -- question, "Who did you make
5 the recommendation to?" Answer, "It would have been Mark
6 Patrick."

7 A I don't recall right now as I sit here, and it seems like
8 I was speculating when I answered, but it -- it probably would
9 have been Mark Patrick. I just don't have a specific
10 recollection.

11 Q You made the recommendation to Mr. Patrick because he was
12 responsible for setting up the overall structure, correct?

13 A I -- I can't testify to why I did something I don't
14 remember. I think that would be --

15 Q Can we --

16 A -- speculative.

17 Q Are you finished, sir?

18 A Yeah.

19 Q Okay.

20 MR. MORRIS: Can we go to Page 299, please?

21 BY MR. MORRIS:

22 Q Lines 6 through 10. Did I ask this question and did you
23 give me this answer? Question, "But why did you select Mr.

24 Patrick as the person to whom to make your recommendation?"

25 Answer, "Because he was responsible for setting up the overall

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Dondero - Direct

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1 structure."

2 Were you asked that question and did you give that answer
3 last Friday?

4 A Yes.

5 Q Thank you. But it's your testimony that you don't really
6 know what process led to Mr. Scott's appointment, correct?

7 A No, I -- I said I was refreshed by Mark Patrick's
8 testimony earlier.

9 Q Yeah. Were you refreshed that, in fact, you specifically
10 had the authority to and did appoint Grant Scott as the
11 managing member of the DAF GP, LLC?

12 A I -- I don't know.

13 Q Well, you're referring to Mr. Patrick's testimony and I'm
14 asking you a very specific question. Did you agree -- is your
15 memory refreshed now that you're the person who put Grant
16 Scott in the position in the DAF?

17 A I -- I don't know if I owned those secret shares that --
18 well, they're not secret, but shares that could appoint
19 anybody on the planet. I guess if I was in that box at that
20 time before Grant, then I would have had that ability. I'm
21 not denying at all that I recommended Grant. I'm just saying
22 I don't -- I don't remember if I went specifically to him or
23 if it was Thomas Surgent that was orchestrating it at the
24 time. I don't remember.

25 Q Do you deny that you had the authority to and that you did

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1 appoint Grant Scott as your successor?

2 MR. TAYLOR: Your Honor, objection to the extent it
3 calls for a legal conclusion. I can't get close to a mic, so
4 --

5 THE COURT: I overrule the objection.

6 THE WITNESS: Can you repeat the question for me?

7 BY MR. MORRIS:

8 Q Do you deny that you had the authority to and that you
9 did, in fact, appoint Grant Scott as your successor?

10 A It'd be better to say I don't -- I don't -- no, I don't
11 remember or I didn't know the details at the time. But,
12 again, I -- I assume I owned those shares. And, again, I do
13 remember recommending Grant and -- but exactly how it
14 happened, I don't remember.

15 Q Did you hear Mark Patrick say just an hour ago that you
16 appointed Grant Scott as your successor?

17 MR. SBAITI: Objection, Your Honor. Misstates
18 testimony. The witness testified he transferred shares.
19 That's different than an appointment power.

20 THE COURT: Response? I can't remember the exact way
21 you worded it, to be honest.

22 MR. MORRIS: Neither can I, but I'll even take it
23 that way.

24 THE COURT: Okay.

25 MR. MORRIS: I think he's wrong, but I'll even take

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Dondero - Direct

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1 it that way.

2 THE COURT: Okay.

3 BY MR. MORRIS:

4 Q Mr. Dondero, did you listen to Mark Patrick say that you
5 are the person who made the decision to transfer the shares to
6 Mr. Scott in 2012?

7 A Yes, I heard him say that.

8 Q Okay. So, do you -- do you dispute that testimony?

9 A I -- I don't have any better knowledge to dispute or
10 confirm.

11 Q You and Mr. Scott have known each other since high school,
12 correct?

13 A Yes.

14 Q You spent a couple of years at UVA together, correct?

15 A Yes.

16 Q You were housemates together, correct?

17 A Yes.

18 Q He was the best man at your wedding, correct?

19 A Yes.

20 Q He's a patent lawyer, correct?

21 A Yes.

22 Q He had no expertise in finance when -- when he was
23 appointed as your successor to the DAF, correct?

24 A Correct.

25 Q To the best of your knowledge, at the time Mr. Scott

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1 assumed his position, he had never made any decisions
2 concerning collateralized loan obligations, correct?

3 A Correct, but he wasn't hired for that. That wasn't his
4 position.

5 Q Was he the person who was going to make the decisions with
6 respect to the DAF's investments?

7 A My understanding on how it was structured was the DAF was
8 paying a significant investment advisory fee to Highland.
9 Highland was doing portfolio construction and the investment
10 selection of -- or the investment recommendations for the
11 portfolio. There is an independent trustee protocol that I
12 believe was adhered to, but it was never my direct
13 involvement. It was always the portfolio managers or the
14 traders.

15 You have to provide three similar or at least two other
16 alternatives, and then with a rationale for each of them, but
17 a rationale for why you think one in particular is better.
18 And the trustee looks at the three, evaluates them. And the
19 way I understand it always worked, that it works at pretty
20 much every charitable trust or trust that I'm aware of, they
21 generally, if not always, pick alongside the -- or, pick the
22 recommendation of their highly-paid investment advisory firm.

23 Q And are you the highly-paid investment advisory firm?

24 A Highland was at the time, yes.

25 Q And you controlled Highland, right?

Dondero - Direct

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1 A Yes.

2 Q Okay. But at the end of the day, is it your understanding
3 that Mr. Scott had the exclusive responsibility for making
4 actual decisions on behalf of the charitable trust that you
5 had created?

6 A Yeah, I mean, subject to the protocol I just described.

7 Q Yeah, okay, so let's keep going. Mr. Scott had no
8 experience or expertise running charitable organizations at
9 the time you decided to transfer the shares to him, correct?

10 A Yes, I believe that's correct.

11 Q Okay. You didn't recommend Mr. Scott to serve as the
12 DAF's investment advisor, did you?

13 A No.

14 Q And until early 2021, as you testified, I believe,
15 already, HCMLP served as the DAF's investment advisor,
16 correct?

17 A Yes.

18 Q And until early 2021, all of the DAF's day-to-day
19 operations were conducted by HCMLP pursuant to a shared
20 services agreement, correct?

21 A Yes.

22 Q And from the time the DAF was formed until January 9,
23 2020, you controlled HCMLP, correct?

24 A Yes.

25 Q You can't think of one investment decision that HCMLP

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1 recommended that Mr. Scott ever rejected in the ten-year
2 period, correct?

3 MR. SBAITI: Objection, Your Honor. Lacks
4 foundation.

5 THE COURT: Response?

6 MR. MORRIS: I'm not quite sure what to say, Your
7 Honor. The witness has already testified that HCMLP was the
8 investment advisor, made recommendations to Mr. Scott, and
9 that Mr. Scott was the one who had to make the investment
10 decisions at the end of the day.

11 MR. SBAITI: He's not here as a witness for HCMLP.
12 He's here in his personal capacity. There's no foundation
13 he'd have personal knowledge of which specific investments
14 were proposed, which ones were rejected or accepted. He said
15 it was done by the portfolio manager.

16 THE COURT: Okay. I overrule. He can answer if he
17 has an answer.

18 BY MR. MORRIS:

19 Q Sir, you can't think of one investment decision that HCMLP
20 ever recommended to Mr. Scott that he rejected, correct?

21 A I can't think of one, but I would caveat with I wouldn't
22 have expected there to be any.

23 Q So you expected him to just do exactly what HCMLP
24 recommended, correct?

25 A No. I would expect him to sort through the various

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1 investments when he was given three or four to choose from and
2 be able to discern that, just as we had with our expertise,
3 which was much greater than his, discern which one was the
4 best and most suitable investment, the best risk-adjusted
5 investment, that he would come to the same conclusion.

6 Q Okay. You can't think of an investment that Mr. Scott
7 ever made on behalf of the DAF that didn't originate with
8 HCMLP, correct?

9 A Again, no, but I wouldn't expect there to be.

10 Q Okay. And that's because you expected all of the
11 investments to originate with the company that you were
12 controlling, correct?

13 A We were the hired investment advisor with fiduciary
14 responsibility --

15 Q Uh-huh.

16 A -- and with a vested interest in making sure the DAF
17 performance was the best it could be.

18 Q Okay. Let --

19 A He was, as you said, a patent attorney. It would have
20 been unusual for him to second-guess. I'm sure, in any
21 private investment or any investment that was one off or
22 didn't have comps, you know, he probably sought third-party
23 valuations. But you would have to talk to him about that, or
24 the people at Highland that did that.

25 MR. MORRIS: I move to strike. It's a very simple

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1 question.

2 THE COURT: Sustained.

3 BY MR. MORRIS:

4 Q Sir, you can't think of one investment that Mr. Scott made
5 on behalf of the DAF that did not originate with HCMLP,
6 correct?

7 A I'm going to give the same answer.

8 Q Okay. Let's go to Page 371 of the transcript, please.
9 Lines 7 through 11.

10 Oh, I apologize. I think I might -- I think I meant 317.
11 I think I got that inverted. Yeah.

12 Did I ask this question and did you give this answer:
13 "Can you think of any investment that Mr. Scott made on behalf
14 of the DAF that didn't original with HCMLP?" Answer, "He
15 wasn't the investment advisor, but no, I don't -- I don't
16 recall."

17 Is that the answer you gave on Friday?

18 A Yes.

19 Q Thank you. Let's --

20 MR. SBAITI: Just for clarification, Your Honor, --

21 THE COURT: Pardon?

22 MR. SBAITI: -- the deposition was last Tuesday, not
23 on Friday.

24 MR. MORRIS: I stand corrected, Your Honor.

25 THE COURT: Okay.

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1 MR. MORRIS: I apologize.

2 THE COURT: Okay.

3 MR. MORRIS: I apologize if the Court thinks I misled
4 it.

5 BY MR. MORRIS:

6 Q Let's talk about Mr. Scott's decision during the
7 bankruptcy case that preceded his resignation. After HCMLP
8 filed for bankruptcy, CLO Holdco, Ltd. filed a proof of claim,
9 correct?

10 MR. ANDERSON: Your Honor, I haven't objected yet,
11 but we literally haven't covered anything that deals with
12 commencing or pursuing a claim or cause of action. I'm going
13 to object. This is way outside, again, the bounds of the
14 contempt hearing. It's -- otherwise, it's other discovery for
15 something else. It literally has nothing to do with pursue a
16 claim or cause of action.

17 THE COURT: We have another relevance objection.
18 Your response?

19 MR. MORRIS: Your Honor, the evidence is going to
20 show that Mr. Dondero told Mr. Scott on three separate
21 occasions that his conduct, which were acts of independence,
22 were inappropriate and were not in the best interests of the
23 DAF. Within days of the third strike, he resigned. Okay?

24 I think it's relevant to Mr. Dondero's control of the DAF.
25 I think that the moment that Mr. -- this is the argument I'm

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1 going to make. I'll make it right now. You want me to make
2 it now, I'll make it now. The moment that Mr. Scott exercised
3 independence, Mr. Dondero was all over him, and Mr. Scott
4 left. That's what happened. The evidence is going to be
5 crystal clear.

6 And I think that that control of the DAF is exactly what
7 led to this lawsuit. And what led -- and I'm allowed to make
8 my argument. So that's why it's relevant, Your Honor, because
9 I think it shows that Mr. Scott -- Mr. Scott, after exercising
10 independence, was forced out.

11 MR. ANDERSON: That doesn't move the needle one bit
12 as to whether a lawsuit was commenced or a claim or cause of
13 action was pursued, which is the subject of the contempt
14 motion. It doesn't move the needle one bit as to those two
15 issues, as to whether that has any bearing on was it commenced
16 or was it pursued.

17 MR. MORRIS: Your Honor, I appreciate the very narrow
18 focus that counsel for a different party is trying to put on
19 this, but it is absolutely relevant to the question of whether
20 Mr. Dondero was involved in the pursuit of these claims. All
21 right? That's what the order says. Pursue.

22 THE COURT: All right. Overruled.

23 BY MR. MORRIS:

24 Q After HCMLP filed for bankruptcy, CLO Holdco filed a proof
25 of claim, correct?

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1 A I believe so.

2 Q And in the fall of 2020, Mr. Scott amended the proof of
3 claim to effectively reduce it to zero, correct?

4 A I -- I guess.

5 Q And Mr. Scott made that decision without discussing it
6 with you in advance, correct?

7 A Yes.

8 Q But you did discuss it with him after you learned of that
9 decision, correct?

10 A I don't -- I don't recall. I'm willing to be refreshed,
11 but I don't remember.

12 Q Well, you told him specifically that he had given up bona
13 fide claims against the Debtor, correct?

14 A Let me state or clarify my testimony this way. Um, --

15 MR. MORRIS: Your Honor, it's really just a yes or no
16 question. His counsel can ask him if he wants to clarify, but
17 it's really just a yes or no question.

18 BY MR. MORRIS:

19 Q You told Mr. Scott that he gave up bona fide claims
20 against the Debtor, correct?

21 THE COURT: Okay.

22 THE WITNESS: I don't know if I told him then with
23 regard to those claims.

24 BY MR. MORRIS:

25 Q Okay. Can we go to Page 321 of the transcript? At the

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1 bottom, Line 21? 22, I apologize.

2 Did I ask this question and did you give this answer?

3 "And what do you" -- Question, "And what do you recall about
4 your discussion with Mr. Scott afterwards?" Answer, "That he
5 had given up bona fide claims against the Debtor and I didn't
6 understand why."

7 Did I ask that question and did you give that answer last
8 Tuesday?

9 A Yes.

10 Q Okay. A short time later, in December, the Debtor filed
11 notice of their intention to enter into a settlement with
12 HarbourVest, correct?

13 A Yes.

14 Q And CLO Holdco, under Mr. Scott's direction, filed an
15 objection to that settlement, correct?

16 A Yes.

17 Q And that settlement, the substance of that settlement was
18 that the Debtor did not have the right to receive
19 HarbourVest's interests in HCLOF at the time, correct?

20 A I don't remember the exact substance of it.

21 Q Okay. But you do remember that you learned that Mr. Scott
22 caused CLO Holdco to withdraw the objection, correct?

23 A Yes, ultimately.

24 Q Okay. And again, Mr. Scott did not give you advance
25 notice that he was going to withdraw the HarbourVest

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1 objection, correct?

2 A No, he -- he did it an hour before the hearing. He didn't
3 give anybody notice.

4 Q You learned that Mr. Scott caused CLO Holdco to withdraw
5 its objection to the HarbourVest settlement at the hearing,
6 correct?

7 A Yes.

8 Q And you were surprised by that, weren't you?

9 A I believe everybody was.

10 Q You were sur... you were surprised by that, weren't you,
11 sir?

12 A Yes.

13 Q And you were surprised by that because you believed Mr.
14 Scott's decision was inappropriate, right?

15 A Partly inappropriate, and partly because 8:00 o'clock the
16 night before he confirmed that he was going forward with the
17 objection. And I think the DAF's objection was scheduled to
18 be first, I think.

19 Q After you learned that Mr. Scott instructed his attorneys
20 to withdraw the CLO Holdco objection to the HarbourVest
21 settlement, you again spoke with Mr. Scott, correct?

22 A Yes.

23 Q And that conversation took place the day of the hearing or
24 shortly thereafter, correct?

25 A Yes.

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1 Q And during that conversation, you told Mr. Scott that it
2 was inappropriate to withdraw the objection, correct?

3 A Yes.

4 Q And in response, Mr. Scott told you that he followed the
5 advice of his lawyers, correct?

6 A Yes.

7 Q But that didn't -- that explanation didn't make sense to
8 you, right?

9 A Yes.

10 Q In fact, you believed that Mr. Scott failed to act in the
11 best interests of the DAF and CLO Holdco by withdrawing its
12 objection to the HarbourVest settlement, correct?

13 A Yes.

14 Q And while you didn't specifically use the words fiduciary
15 duty, you reminded Mr. Scott in your communications with him
16 that he needed to do what was in the best interests of the
17 DAF, correct?

18 A Yes.

19 Q You're the founder of the DAF, correct?

20 A I put it -- I put it in motion. Yeah. I tasked Mark
21 Patrick and third-party law firms to do it, but if that boils
22 down to founder, I guess yes.

23 Q Uh-huh. And you're the primary donor to the DAF, correct?

24 A Yes.

25 Q You're the investment advisor to the DAF, or at least you

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1 were at that time?

2 A Yes.

3 Q And because you served in these roles, you expected Mr.
4 Scott to discuss his decision to withdraw the HarbourVest
5 objection in advance, correct?

6 A Yes, I -- I think it was even broader than that. I mean,
7 he was having health and anxiety issues, and to the extent he
8 felt overwhelmed, I -- you know, yeah, you should do what's in
9 the best interests at all times, but -- but yes, I thought it
10 would be helpful if he conferred with me or Mark Patrick or
11 whoever he was comfortable with.

12 Q Mr. Dondero, you specifically believed that Mr. Scott's
13 failure to tell you that he was going to withdraw the
14 HarbourVest objection in advance was inappropriate, right?

15 A Yes.

16 Q Even though he was the sole authorized representative, you
17 believed that, because you were the founder of the DAF, the
18 primary donor of the DAF, and the investment advisor to the
19 DAF, he should have discussed that before he actually made the
20 decision, correct?

21 A No. What I'm saying is at 8:00 o'clock at night, when he
22 confirms to numerous people he's ready to go first thing with
23 his objection, and then he or counsel or some combination of
24 them change their mind and don't tell anybody before the
25 hearing, that's odd and inappropriate behavior.

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1 MR. MORRIS: Can we go to Page 330 of the transcript,
2 please?

3 And Your Honor, before I read the testimony, there is an
4 objection there. So I'd like you to rule --

5 THE COURT: Okay.

6 MR. MORRIS: -- before I do that. It can be found at
7 -- on Page 330 at Line 21.

8 (Pause.)

9 MR. MORRIS: Here we go. Page 30, beginning at Line
10 19. 330, rather.

11 THE COURT: Okay.

12 (Pause.)

13 THE COURT: Okay. I overrule that objection.

14 BY MR. MORRIS:

15 Q Mr. Dondero, were you asked this question and did you give
16 this answer last Tuesday? Question, "Do you believe that he
17 had an obligation to inform you in advance?" Answer, "I don't
18 know if I would use the word obligation, but, again, as the
19 founder or the primary donor and continued donor to the DAF,
20 and as the investment advisor fighting for above-average
21 returns on a daily basis for the fund, significant decisions
22 that affect the finances of the fund would be something I
23 would expect typically a trustee to discuss with the primary
24 donor."

25 Did you give that answer the other day, sir?

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